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No. 44 Fall 1993

The Newsletter of the Canadian Institute of Resources Law

Australian Developments in Intergovernmental Co-operation in Environmental Impact Assessment

*by Alex Gardner**

Introduction

Australia, like Canada, has recently experienced conflicts and developments in intergovernmental co-operation in environmental impact assessment ("EIA"). The Australian experience has not generated the litigation which has punctuated Canadian federal environmental decision-making,[1] but it has seen some controversy and the negotiation of new intergovernmental agreements on co-operation in the management of EIA. This article describes the new agreements and assesses the likelihood of success in their implementation.

Australian and New Zealand Environment and Conservation Council

The main forum for the negotiation of the new agreements has been the Australian and New Zealand Environment and Conservation Council ("ANZECC"). ANZECC functions in a similar way to the Canadian Council of Ministers of the Environment. It is a council of ministers with environmental and conservation portfolios in the Commonwealth, State and Territory Governments of Australia and New Zealand[2] who meet two or three times a year to discuss policy and share information. ANZECC is supported by standing committees and working parties of senior bureaucrats selected on a similarly representative basis. ANZECC's agenda on EIA has been part of a larger program for inter-governmental co-operation in environmental management undertaken by the Council of Australian Governments, which is comprised of the heads of the Commonwealth, State and Territory Governments, and the President of the Australian Local Government Association. That program culminated in the *Intergovernmental Agreement on the Environment* ("the IGAE") in May 1992. I will describe the IGAE first and then return to the work of the ANZECC relating to EIA.

Intergovernmental Agreement on the Environment

The IGAE is a pseudo-legal (one is tempted to say pseudo-constitutional) agreement entered into by all the governments of Australia, those representing the Commonwealth, States and major Territories (the Northern Territory and the Australian Capital Territory)[3] and the President of the Australian Local Government Association. It is the product of quiet bureaucratic negotiations, presented in formal layout and language, and officially signed by all of the first ministers.

The IGAE provides for intergovernmental co-operation in environmental management by:

Résumé

En Australie comme au Canada, la coopération intergouvernementale en matière d'évaluation d'impact environnemental (EIE) a été marquée par des conflits, mais elle a aussi fait l'objet de développements récents, notamment la signature de deux ententes intergouvernementales multilatérales. Cet article décrit ces nouvelles ententes et évalue les chances de succès de leur mise en oeuvre. L'Entente intergouvernementale sur l'environnement a été signée le 1er mai 1992. Elle fournit un cadre de coopération en matière de gestion de l'environnement. Le mécanisme coopératif clé prévu par l'entente est le concept d'habilitation des procédures de prise de décision d'un niveau de gouvernement, qui forme la base de l'exercice des pouvoirs décisionnels respectifs du Commonwealth et des gouvernements des États. La deuxième entente porte sur l'EIE; encore à l'état d'avant-projet, elle devrait être signée sous peu. Celle-ci offre un cadre spécifique de coordination de l'évaluation environnementale de ces propositions qui auraient des répercussions sur plusieurs juridictions, et se sert du concept d'habilitation pour déterminer, dans la mesure du possible, qu'un seul processus d'EIE s'applique à telle ou telle proposition. L'habilitation des procédures se fera par le biais d'ententes intergouvernementales bilatérales. La mise en oeuvre de ces ententes et du mécanisme d'habilitation soulève des problèmes juridiques et politiques.

(1) defining the roles ("responsibilities and interests") of the three levels of government: Commonwealth, State and local;

(2) establishing the framework for accommodating the interests of one government in the execution of the responsibilities of another government; and

(3) establishing, in a set of schedules to the Agreement, protocols for addressing the following specific areas of environmental policy and management: data collection and handling, land use decisions and approval processes, EIA, environmental protection measures (e.g., pollution control standards and guidelines), climate change, biological diversity, heritage protection and nature conservation.

The terms "responsibilities" and "interests" are not defined in the IGAE but one could, from the usage of the terms in the document, define "responsibilities" as generally acknowledged subjects of direct constitutional power. "Interests" are subjects which may have consequential or incidental effects on matters within direct power. The responsibilities and interests of the Commonwealth are agreed to relate to foreign policy and international obligations, environmental effects reaching beyond one State or into Australia's maritime jurisdiction, and facilitating the co-operative development of national environmental standards and guidelines.[4] Each State is said to have responsibility for developing the legislative and administrative framework for managing natural resources and the environment within the State. The States are said to have both an interest and a responsibility in the development of national environmental standards, and an interest in developing Australia's position in relation to international agreements.

It is clear that the interests of one government can overlap with the responsibilities of another. Where they do so, the IGAE provides a mechanism for accommodating these interests in the execution of the responsibilities of the other government. The mechanism is the giving of "full faith and credit to the results of mutually approved or accredited systems, practices, procedures or processes". This concept is defined[5] to mean

> "... that the Commonwealth and the States acting in accordance with the laws in force in their jurisdictions, will accept and rely on the outcomes of [the] system or the practices, procedures or processes [which have been approved or accredited] ... as a basis for their decision making".

Giving full faith and credit still permits the Commonwealth or the States to take into account in their decision making unforeseeable circumstances, flawed execution of process, or factors other than those dealt with in the accredited system, practice, procedure or process. The accreditation process depends on bilateral intergovernmental negotiation and agreement to identify the respective responsibilities and interests of the Commonwealth and State(s) and to accredit either the other's procedure or a modified procedure as the basis on which governments will exercise their decision making powers.[6]

Whilst the accommodation mechanism of full faith and credit is the key to the IGAE framework for intergovernmental co-operation, the document also sets out agreed

considerations and principles for environmental management.[7] The considerations acknowledge the need for the integration of environmental and economic decision making and the interdependency of environmental and economic well-being. The principles are:

(1) *precautionary principle* - where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

(2) *intergenerational equity* - the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;

(3) *conservation of biological diversity and ecological integrity* - the principle is not defined in the IGAE, only stated to be a "fundamental consideration";[8] and

(4) *improved valuation, pricing and incentive mechanisms* - the better incorporation of economic costs and incentives in environmental regulation.

Schedule 3 of the IGAE deals with EIA. It contains a statement of agreed principles for the EIA procedures to be adopted by all governments. The principles pertain to the scope of EIA, its application to the public and private sectors, and public disclosure of information. The principles also envisage criteria for guiding EIA. The Schedule further proposes that the Commonwealth and the States will negotiate:

- a general framework agreement to avoid duplication in the administration of EIA; and
- bilateral arrangements for the approval and accreditation of EIA processes either generally or for specific purposes.

National Agreements on EIA

In November 1992, ANZECC released for public comment two draft documents concerning EIA in Australia: the "Basis for a National Agreement on Environmental Impact Assessment" ("the draft EIA Agreement")[9] and "Guidelines and Criteria for Determining the Need for and Level of Environmental Impact Assessment in Australia" ("the Guidelines and Criteria"). These agreements reflect two concerns with intergovernmental co-operation in EIA:

(1) *harmonization* of the practice of EIA in each jurisdiction; and

(2) *co-operation* in the assessment of proposals having an impact on more than one jurisdiction.

The draft EIA Agreement purports to provide a general framework for the administration of EIA for proposals which involve more than one party to the Agreement; i.e., State and Commonwealth Governments. Its objectives include "ensuring, as far as practicable, that only one EIA process is undertaken for any particular proposal".[10] The Schedule to the draft EIA Agreement states that the coming into effect of the Agreement would cancel the pre-existing bilateral agreements between the States and the Commonwealth on EIA.[11]

In accordance with the mechanism proposed by the IGAE, the draft EIA Agreement provides that where a proposal with significant environmental effects may require the approval of more than one party, the parties "will determine the appropriate form of the co-operative assessment ... in accordance with [the draft EIA Agreement] and having regard to the objectives of this Agreement and the legislative requirements of each jurisdiction".[12] The core provisions of the draft EIA Agreement provide for the accommodation of interests in situations involving Commonwealth and State interests[13] or simply competing State interests.[14] In each situation, the parties may agree to an assessment led by one party or a joint assessment. The draft EIA Agreement then sets out procedures for co-operation in assessments of both types. In each case, provision is made for the negotiated amendment of the EIA process to meet the statutory requirements of the accrediting party and that party undertakes to give full faith and credit to the approved process. Finally, the draft EIA Agreement contemplates schedules dealing with, among other things, legislative differences between parties.[15]

The Guidelines and Criteria are intended to guide the decisions of assessing authorities and to assist proponents to understand these decisions. The factors to be considered are:

- the character of the receiving environment;
- the potential impacts of the proposal;
- the resilience of the environment to cope with change;
- confidence of the prediction of impacts;
- the presence of planning or policy framework or other procedures;

- other statutory approval processes; and
- the degree of public interest.

The Guidelines and Criteria also suggest details to be considered in relation to each of these factors. The document expresses the hope that "[a]doption of these criteria around Australia will therefore mean that all jurisdictions will be using a consistent approach".

Bilateral Accreditation Agreements

To date there has been little progress in preparing bilateral agreements for general accreditation in respect of EIA. Intergovernmental efforts, so far, have focused on preparing the draft EIA Agreement as a basis for accreditation agreements on specific proposals.

Implementation of the Agreements

The implementation of these intergovernmental agreements may encounter legal and political problems. Legal problems could arise if the laws of a jurisdiction do not authorise the co-operative arrangements or if they require procedures which are not satisfied by the co-operative process. The IGAE and the draft EIA Agreement propose the conduct of procedures by one level of government in satisfaction of the procedural requirements of the other, or the conduct of joint procedures (i.e., modified versions of their respective procedures) to satisfy the requirements of both levels of government.

Although both agreements provide for co-operation only in the conduct of procedures and acknowledge the need for the separate exercise of the actual decision-making powers, is this sufficient to meet statutory requirements? The agreements provide that the co-operative arrangements will be defined by the two levels of government and will be consistent with the legal requirements of each. Unfortunately, the exigencies of executive government sometimes colour the interpretation of legal requirements. The varied EIA procedural requirements of each jurisdiction may be overlooked or undervalued in pursuit of political compromise on assessment procedures for pressing projects.

The potential for this to occur is increased by the lack of statutory authority for co-operative arrangements. State legislation respecting EIA contains no express provisions for intergovernmental co-operation.[16] Only Western Australia has legislative provisions which could be used for the purposes of intergovernmental co-operation on EIA. The *Environmental Protection Act 1986* (WA) provides powers of delegation by the Minister, the Environmental Protection Authority and Chief Executive Officer of the Department of Environment. These persons may delegate all or any of their powers and duties under the Act to "any other person"[17] and there would seem to be nothing stopping the delegation of EIA procedures to the Commonwealth. Thus, with one possible exception, the States do not have the statutory authority to enter the co-operative arrangements for EIA contemplated by the IGAE and the draft EIA Agreement. Whether a particular exercise of the co-operative arrangements could be held invalid will depend on the degree of legislative prescription of the State's assessment procedures.

The Commonwealth legislation for EIA contains no express provisions concerning intergovernmental co-operation but it does provide for the creation of "Administrative Procedures" for such co-operation.[18] These procedures are primarily avenues of consultation with State and local government authorities in relation to:[19]

(1) the requirement of a proponent to prepare an environmental impact statement ("EIS");

(2) the content of the EIS;

(3) comments on the draft EIS;

(4) the distribution of the final EIS; and

(5) the exemption of a proposed action or class of actions from the requirements of the Administrative Procedures.

The procedures require the Commonwealth Minister or Department to take into account, when determining the need for an EIS, "any environmental assessment action taken relevant to the proposed action by any State ...".[20] Balancing this consideration is the requirement that the Minister, in determining whether to exempt a proposal from Administrative Procedures, have regard to the principle that "the requirements of [the] procedures should, as far as reasonably possible, apply to all proposed actions".[21] Finally, the Administrative Procedures authorize the Minister to enter into an arrangement with a State to facilitate the joint assessment of a proposed action.[22]

In summary, the legal support and guidance for intergovernmental co-operation in environmental impact assessment is meagre, but possibly adequate given the probable use of the proposed arrangements. The Commonwealth Minister has authority under the Administrative Procedures to undertake a joint assessment with a State or effectively to delegate the assessment to a State by exempting a proposal from Commonwealth assessment procedures if the State procedures meet the Commonwealth requirements. There is no authority to vary the requirements for the purpose of establishing a distinct regime for environmental assessment in co-operation with a State. It is doubtful whether any of the States have the legal authority to delegate an assessment to another jurisdiction but it is also likely to be rare that the States will defer to Commonwealth procedures. The States have no express authority to vary the requirements of their own laws to undertake a joint assessment but, in most cases, those laws do not prescribe their procedures in detail.

The political problems for the implementation of the agreements lie in the assertion of States' rights by newly elected governments who were not party to the drafting of the agreements. The recent changes of the political colour of the governments in Victoria and Western Australia seem to have stalled the IGAE process because of concerns that the co-operative arrangements extend Commonwealth influence in State affairs. At the senior bureaucratic level, however, years of work on the IGAE have nourished a commitment to the IGAE principles which in time will no doubt filter through to the new governments.

Even if the implementation of the IGAE proceeds more cautiously, it is likely to progress, at least on EIA, because the truth is that the Commonwealth is creating the means of deferring to State processes, albeit on condition of compliance with Commonwealth standards. Although the IGAE purports to create reciprocal procedures, in reality the Commonwealth defers to State procedures where the project is within State jurisdiction and generally only uses its own procedures where the proponent is a Commonwealth agency or the proposal involves Commonwealth land. Statistics from the Commonwealth Environment Protection Agency support this view. During the course of 1992-93, the Commonwealth conducted 8 assessments under its own procedures and was involved in 32 assessments conducted under State procedures. Only one of those 32 was a joint Commonwealth-State assessment.

In conclusion, the processes of intergovernmental co-operation in Australia are working reasonably well using the vehicle of State procedures meeting Commonwealth standards. However, the statutory authority for the co-operative arrangements could be improved to provide for the exigencies of political decision-making.

An article by the author giving a detailed comparative discussion of Australian and Canadian intergovernmental co-operation on environmental assessment will be published in the Australian Environmental and Planning Law Journal in early 1994.

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Notes

1. See, for example: the Oldman River Dam case, Friends of Oldman River Society v Canada [1992] 2 WWR 193; (1992) 88 DLR (4th) 1 (S.C.C.), the Rafferty/Alameda Dam cases of Canadian Wildlife Federation v Canada [1989] 4 WWR 526 (F.C.T.D.), aff'd [1990] 2 WWR 69 (F.C.A.D.) and Canada (Attorney General) v Saskatchewan Water Corp [1992] 4 WWR 712 (Sask. C.A.) and the Great Whale Project cases of Eastmain Band v Robinson (1992) 7 CELR 230 (F.C.T.D.); (1992) 9 CELR (NS) 257 (F.C.A.D.) and Cree Regional Authority v Robinson (1991) 84 DLR (4th) 51 (F.C.T.D.).

2. New Zealand is a full voting member of ANZECC but it tends not to participate in the determination of matters which relate only to Australian affairs.

3. The IGAE defines "States" to include the Northern Territory and the Australian Capital Territory. I shall adopt that definition here.

4. IGAE, section 2.2. The responsibilities and interests of the Commonwealth are not separately identified except that the Commonwealth is acknowledged to have "responsibility for the management ... of living and non-living resources on land which the Commonwealth owns or which it occupies for its own use".

5. IGAE, section 1.5.

6. IGAE, section 2.5.1 and 2.5.3.

7. IGAE, section 3, Principles of Environmental Policy.

8. The principle could be understood in the terms proposed by the World Commission on Environment and Development: "States shall maintain ecosystems and ecological processes essential for the functioning of the biosphere, shall preserve biological diversity, and shall observe the principle of optimum sustainable yield in the use of living natural resources and ecosystems". World Commission on Environment and Development, *Our Common Future*, (New York: Oxford University Press, 1987) 348, Annexe 1 to the Report.

9. Australian and New Zealand Environment and Conservation Council, Working Group on National Environmental Impact Assessment, Draft 4 of 2 November 1992, hereafter referred to as "draft EIA Agreement". There have been

2 further drafts since November 1992 which are not yet publicly available.

10. Draft EIA Agreement, clause 4.1.1.(iv).

11. The bilateral agreements are those between South Australia and the Commonwealth of 22 June 1977; Victoria and the Commonwealth of 6 July 1977; Western Australia and the Commonwealth of 15 July 1977; Tasmania and the Commonwealth of 18 July 1977; New South Wales and the Commonwealth of 19 December 1983 and the Northern Territory and the Commonwealth of 4 February 1990.

12. Draft EIA Agreement, clause 5.2.1.(iii).

13. Draft EIA Agreement, clause 6.

14. Draft EIA Agreement, clause 7.

15. Draft EIA Agreement, clause 11.

16. See Environmental Planning and Assessment Act 1979 (NSW); Environmental Effects Act 1978 (Vic); Planning Act 1982 (SA); Local Government (Planning and Environment) Act 1990 (Qld) and the State Development and Public Works Organization Act 1971 (Qld); Environment Protection Act 1973 (Tas); Environmental Assessment Act 1982 (NT) and Environmental Protection Act 1986 (WA).

17. Environmental Protection Act 1986 (WA) ss.18-20. There are similar powers of delegation in the State Development and Public Works Organization Act 1971 (Qld). Powers of delegation in the environmental legislation of other States are drawn too narrowly to permit their use for intergovernmental co-operation.

18. Environmental Protection (Impact of Proposals) Act 1974 (Cth), ss.6-7C.

19. Environment Protection (Impact of Proposals) Administrative Procedures 1987 (Cth), cls.3.3, 4.6, 6.4, 8.2 & 11.2 respectively. References in the text to environmental impact statement include the public environmental report, which is a small document.

20. Environment Protection (Impact of Proposals) Administrative Procedures 1987 (Cth), cl.3.1.2(b).

21. Environment Protection (Impact of Proposals) Administrative Procedures 1987 (Cth), cl.11.3.2.

22. Environment Protection (Impact of Proposals) Administrative Procedures 1987 (Cth), cl.12.2.

Preliminary Announcement
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NAFTA and the Environment

*by Bradly Condon**

Introduction

The North American Free Trade Agreement (NAFTA) replaces the Canada-United States Free Trade Agreement (FTA) and incorporates and adds to the trade rules contained in the General Agreement on Tariffs and Trade (GATT) and the GATT Standards Code respecting environmental protection. It thus builds upon the legal framework set out in these prior trade agreements. However, the NAFTA adds no new legally binding environmental obligations to the trade laws that governed the relationship between trade and the environment under the GATT and the FTA.[1]

Résumé

Du point du vue juridique, les obligations de l'ALENA sur l'usage de restrictions commerciales à des fins environnementales domestiques sont les mêmes que celles qui se trouvent dans le GATT et l'Accord Canado-Américain. L'article 104 est nouveau, mais il représente une codification des interprétations en vertu du GATT et des principes du droit international sur l'usage des restrictions commerciales pour protéger l'environment international. Tous les autres articles nouveaux concernent des obligations politiques. Donc, l'ALENA maintient le statu quo juridique et n'autorise l'utilisation de restrictions commercials internationales à des fins environnementales que dans les cas où il n'existe aucun autre moyen aussi efficace de réaliser ces fins.

Like its predecessors, the NAFTA requires environmental protection to be "trade friendly" by limiting the availability of trade restrictions to pursue environmental goals. The NAFTA is not concerned with *what* environmental policies must be, but rather *how* they are to be achieved. Trade restrictions may only be used to achieve environmental goals where they are the most effective means of doing so. The NAFTA thus goes as far as a trade agreement can to balance the goals of trade liberalization and environmental protection without undermining its primary goal of eliminating barriers to trade between its parties.

The NAFTA maintains the legal *status quo* by confirming the general rule that parties must use the least trade-restrictive means available to implement both domestic and international environmental policies. It maintains the freedom of each party to determine its own domestic environmental policies and to establish international environmental policy goals in concert with other nations. The NAFTA thus does nothing to enhance or diminish the pre-existing rights of the parties with respect to environmental regulation and pursues trade liberalization in a way that is consistent with the prevailing principles of international law.

Policy Freedom

The NAFTA contains more environmental provisions than any previous trade agreement. However, only some of those provisions are mandatory. The environmental provisions of the NAFTA regarding domestic measures may be classified under two categories: binding legal obligations and non-binding political commitments. Those that fall under the first category all confirm and adopt the GATT and FTA rules on the use of trade restrictions to implement domestic environmental policies. All of the new environmental provisions governing domestic environmental policies in the NAFTA fall into the second category. They confirm the freedom of each party to choose the substance of its domestic environmental policies without jeopardizing its trade privileges under the NAFTA.

None of the new provisions that deal with domestic environmental protection, all of which address policy formulation, are legally binding. The Preamble merely lists general political principles to follow in the formulation of environmental policies. Article 1114 permits the use of political pressure, but not trade sanctions, to seek changes in the environmental practices of other Parties. Article 907 sets out risk assessment guidelines, without making risk assessment mandatory.

Several NAFTA provisions confirm that each party retains complete freedom to determine its own environmental policies. With respect to standards, article 904(2) confirms the right to choose levels of protection and article 905(3) confirms the right to exceed the levels set by international standards. Generally, article 2101 confirms that each party's freedom to select its own policies is in no way impaired by its trade obligations. Article 2101 incorporates GATT article XX, which in turn has been interpreted as maintaining policy freedom. GATT article XX was intended to allow parties to impose trade-restrictive measures inconsistent with the GATT to pursue overriding public

policy goals to the extent that such inconsistencies were unavoidable.[2] The definition of environmental protection and sustainable development as legitimate objectives in article 915, while not adding anything new to the binding obligations of the GATT or the FTA, further supports the proposition that policy freedom remains intact.

General Environmental Exceptions

The environmental exceptions in NAFTA article 2101 are the same as those of the GATT and the FTA, except for the explicit reference to "environmental measures" in the NAFTA. While GATT articles XX(b) and (g) do not apply explicitly to environmental measures, they implicitly cover most environmental concerns. Moreover, they have been applied to environmental measures, such as wildlife[3] and natural resource[4] conservation. A similar European provision has been applied to waste reduction and the "three Rs" -- re-use, reduce, recycle.[5] There is no reason to think that the GATT articles would not also apply to such environmental measures. Thus, the inclusion of the terms "environmental measures" and "living and non-living exhaustible natural resources" in NAFTA article 2101 merely clarifies the application and scope of GATT articles XX(b) and (g), without substantively modifying them.

Environmental Standards

Similarly, NAFTA Chapter Nine incorporates the rules of the Standards Code and FTA Chapter Six, without any significant modifications to the binding environmental provisions. Article 904(4) imposes the same discipline on the use of trade-restrictive standards as did Standards Code article 2.1 and FTA article 603 -- all three provisions prohibit unnecessary obstacles to trade. Article 904(1) merely imposes a preliminary test, an insignificant change that will not affect the key "least trade-restrictive" test implicit in article 904(4). The obligation in article 905, to set domestic standards with reference to international standards, duplicates the same requirement in the Standards Code.[6] The presumption in article 905(2), that standards that are based on international standards are consistent with the NAFTA, was implicit in article 2.2 of the Standards Code. Finally, NAFTA Chapter Nine, like the Standards Code and FTA Chapter Six, does not permit the use of trade restrictions to equalize perceived competitive disadvantages that may flow from differences in process standards and production methods ("PPMs").

Like the FTA, the NAFTA focuses on a slightly broader array of governmental actions than the Standards Code by including PPMs in the definition of what constitutes a "standards-related measure". However, while PPMs may affect the competitiveness of domestic industries, influence investment decisions, and thus indirectly affect trade, the fact that this issue is addressed in article 1114 of Chapter Eleven, suggests that Chapter Nine is not intended to cover this particular effect of environmental standards on trade. Rather, Chapter Nine focuses on domestic environmental standards that either prohibit the entry of foreign products or services or impose costs on imports so that domestic goods and services gain a competitive advantage over imports in the domestic market.

Article 904(3), like GATT article III, confirms that Chapter Nine does not permit the extraterritorial environmental impact of PPMs to justify discriminatory standards. PPMs may only be taken into account if they alter the environmental impact or safety of the product itself. The environmental impact of PPMs on the environment *outside* the importing nation is irrelevant to the determination of whether products are alike, under GATT article III, NAFTA articles 904(3) or 301, or the comparable national treatment provisions of the FTA and the Standards Code. An importing country may protect its own environment, but it cannot impose trade restrictions based on the way the exporting country treats its domestic environment or the global commons. Consequently, domestic standards may not discriminate against imported goods based on PPMs that do not have a domestic environmental impact.

International Environmental Protection

Like the GATT[7], the NAFTA does not permit the use of trade sanctions to influence the environmental policies of other nations or affecting the global commons. International environmental considerations cannot justify restrictive trade practices, except where these are introduced through specific provisions in an environmental convention that is accepted by all of the parties. The specific trade obligations in the agreements listed in article 104 would have prevailed over the GATT provisions under international law. Article 104 thus codifies the implicit GATT requirement that measures that are inconsistent with trade obligations must expressly or implicitly be intended to prevail, notwithstanding that inconsistency, by agreement among the affected trading partners.

The Least Trade-restrictive Rule

NAFTA articles 2101, 904(4), and 104 are all framed as exceptions to the principle of non-discrimination. Thus, the central issue in the NAFTA, like the GATT, the Standards Code and the FTA, remains whether the true purpose of a trade-restrictive environmental measure is to protect the environment or to protect domestic

industries from foreign competition. The key test implied in all of these provisions is whether the importing nation has chosen the least trade-restrictive means available to implement its environmental policies.

The characterization of the specific environmental goal pursued by an environmental standard is key to determining whether the standard employs the least trade-restrictive means of achieving that goal. It may be difficult to distinguish environmental policies from environmental strategies, but the distinction is an important one. The least trade-restrictive test is designed to challenge the strategies or methods used to implement those policies, not the policies themselves. The NAFTA rules are not intended to interfere with a national government's right to choose its own environmental policies.

Conclusion

NAFTA's general rules regarding the implementation of *domestic* environmental policies in ways that restrict trade, contained in article 2101, impose the same binding obligations on the parties as GATT articles XX(b) and (g) and FTA article 1201. NAFTA's specific rules regarding the use of trade barriers to implement and enforce *domestic* environmental standards are effectively the same as article 2.1 of the Standards Code and FTA article 603. NAFTA's non-binding guidelines regarding the formulation of *domestic* environmental policies and the selection of *domestic* levels of environmental protection are, in general, new to trade law. However, because they are not binding, they do nothing to alter the *status quo* as far as *binding* obligations are concerned. NAFTA article 104, however, is a new provision addressing domestic implementation of *international* environmental policies, but it does not represent a significant departure from pre-existing customary and conventional international law.

From a strictly legal perspective, the NAFTA does nothing to either weaken or strengthen environmental laws. However, the NAFTA provides a framework within which Canada, Mexico and the United States may cooperate in the development of continental environmental protection that complements continental economic development. In this regard, article 104 provides a legal mechanism whereby future bilateral and multilateral environmental accords may be incorporated into the NAFTA to ensure that the trade rules do not undermine efforts to address common environmental concerns. At the same time, it requires that the environmental protection schemes on this continent respect the sovereignty of each nation and avoid protectionism disguised as environmentalism.

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Notes

1. A side agreement on environmental co-operation sets up a trilateral commission to promote co-operation and to enhance the enforcement of environmental laws in the NAFTA countries. It includes the power to recommend trade sanctions against Mexico if it fails to enforce its domestic laws. However, the side agreement does not alter the provisions of the NAFTA that are analyzed in this article.

2. *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, Report of the GATT Panel (7 November 1990) BISD, 37th Supp. 200, DS 10/R, 30 I.L.M. 1122 (1991) at I.L.M. 1138, cited and applied in *United States - Restrictions on Imports of Tuna*, Report of the GATT Panel (3 September 1991) DS21/R, 30 I.L.M. 1594.

3. *United States - Restrictions on Imports of Tuna, ibid.*

4. *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, Final Report of the FTA Panel (16 October 1989), 2 Can. Trade & Commodity Tax Cases (CCH) 7162; *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, Report of the GATT Panel (20 November 1987) BISD, 35th Supp. 98; and *Lobsters from Canada*, Final Report of the FTA Panel (25 May 1990), 3 T.C.T. 8182.

5. *Re Disposable Canada - Commission of the European Community* v. *Kingdom on Denmark* (1988), [1989] C.M.L.R. 619 (European Court of Justice).

6. While FTA Chapter Six does not explicitly refer to international standards, article 602 affirms the Parties' rights and obligations under the Standards Code.

7. *United States - Restrictions on Imports of Tuna, supra*, note 2.

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On December 23, 1993 the Institute will be moving to new quarters in the University of Calgary's Professional Faculties Building.

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Recent Developments in Canadian Oil and Gas Law

*by Susan Blackman**

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Oil and Gas

Royalties as Interests in Land -- Gross Royalty Trust Agreements

In the oil and gas industry, lessors under freehold leases typically assigned their royalty interests to trustees under gross royalty trust agreements (GRTAs). For decades there has been uncertainty in the law as to whether the agreement transferred an interest in land that would survive a change of parties and would last should the original lease be surrendered. The nature of the interest granted under a gross royalty trust agreement was considered by Hunt J. in three test cases in *Scurry-Rainbow Oil Ltd.* v. *Galloway Estate* (1993), 8 Alta. L.R. (3d) 225 (Q.B.).

The first issue the court addressed was whether a lessor's royalty could be an interest in land. Hunt J. reviewed the authorities and concluded that the royalty is part of the compensation payable to the lessor for the use of the land and that it may be construed in a proper case as a *profit à prendre* or as an interest analogous to rent.

Hunt J. considered the wording of the royalty clauses in the leases and the authorities on construction of royalty clauses and concluded that too much emphasis on fine distinctions as to the wording of the clauses was not appropriate. Rather, the approach to use was to consider what was the substance of the transaction and what were the parties trying to achieve? On this basis she concluded that the "real objective of the transaction is for the lessor to receive compensation for granting the lessee rights to use his or her land; and the royalty to be paid is clearly part of that package of compensation and thus either a species of rent or akin to rent." Therefore, the lessor's royalty interest under these leases was an interest in land. In any case, the result would be the same if the lessor's interest was contractual and the lessor retained a reversionary interest under the lease.

Hunt J. took a similar approach to the royalty assignment clauses in the GRTAs. She focused on words such as "grant, bargain, sell, assign, transfer and set over all the estate, right, title, interest, claim ..." and concluded that the GRTAs showed an intention to assign an interest in land. In holding that the royalty transferred in the GRTA was an interest in land, she held it was an interest analogous to a rent or a species of *profit à prendre.* In this respect, Hunt J. disagreed with the trial judge in *Guaranty Trust Co.* v. *Hetherington* (1987), 50 Alta. L.R. (2d) 193 (Q.B.), who considered the same GRTA as was considered in one of these three test cases. That judge had focused on language in the GRTA that indicated an intention to assign a right to receive a payment of money rather than an interest in minerals.

In all of the GRTAs, the lessor covenanted to reserve the royalty to the trustee under any future lease that may be made and it was argued that this clause offends the rule against perpetuities. Hunt J. concluded that the rule is not offended by a transfer of a royalty and that such a transfer creates an interest vested as of the date of the agreement even though the interest may not be enjoyed until there is production. As for the provision as to future leases, the trustee's interest having vested upon transfer of the royalty under the first lease, the interest could not become contingent while awaiting the execution of another lease, since "[a] vested interest is vested for all time..." (*Hanson* v. *Ware*, 274 S.W. 2d 359 (1955))

In *Scurry-Rainbow Oil Ltd.* v. *Kasha* (August 5, 1993), Edmonton 9003-04310, [1993] A.J. No. 579, Lefsrud J., in considering another GRTA, reached the same conclusion solely on a consideration of the wording of the agreements involved. Clearly, the parties intended to convey an interest in land and intended to have the royalty interest in future leases subject to the GRTA.

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New Publications

Environmental Protection: Its Implications for the Canadian Forest Sector, by Monique Ross and J. Owen Saunders, 1993, 173 pages. ISBN 0-919269-34-6 $30.00

This book is designed to give an overview of the legal framework in which the Canadian forest industry operates. This framework comprises an array of federal and provincial legislation, as well as certain common law obligations. The interaction of federal and provincial jurisdictions gives rise both to potential problems for effective resource management and to new and legally interesting forms of federal-provincial cooperation. This cooperation may prove increasingly necessary, as Canada takes on new international obligations with implications for its forest sector.

The purpose of this book is to review various legislative and regulatory mechanisms developed by the two levels of government to prevent, or at least attempt to control, adverse environmental effects of forest industry operations. Rather than providing an exhaustive review of all applicable environmental provisions, the book focuses on three types of intervention: those relating to water and air pollution; the regulation of pesticides; and the use of the environmental impact assessment process. The book assesses the implications of these provisions on the forest sector, as well as their actual enforcement. It concludes with an evaluation of the impact that emerging international obligations may have on both the extent of environmental controls imposed on the forest sector and the shared federal-provincial jurisdiction in that respect.

Canadian Law of Mining, by Barry J. Barton, 1993, 522 pages. ISBN 0-919269-39-7 $135.00 (Hardcover)

This book discusses title to minerals, primarily as granted under mining legislation. This publication is an essential tool to legal practitioners, as well as explorationists, industry personnel, and government policy-makers. It provides a single reference source to all mining law material that is to be found in legislation, case law and elsewhere.

For more details about this publication, please see the enclosed brochure.

Alberta's Wetlands: Legal Incentives and Obstacles to Their Conservation, by Darcy M. Tkachuk, 1993, 33 pages. ISBN 0-919269-37-0. $10.00

This paper examines the effects of the common law, statutes, and policies which impact upon Alberta's wetland resources. Wetlands are among the most diverse and environmentally sensitive ecosystems in the world, but they have not been adequately recognized as valuable natural resources which deserve protection under the law. In this paper, both the older legal instruments that promoted wetland destruction and the newer generation of legislation and policies that encourage conservation are discussed. A series of recommendations are also made for eliminating the dichotomy that promotes both the conservation and destruction of wetlands. This paper was the 1992 winning entry in the Institute's annual national Essay Prize competition.

Law and Process in Environmental Management, Essays from the Sixth Institute Conference on Natural Resources Law, edited by Steven A. Kennett, 1993, 422 pages. ISBN 0-919269-41-9 $80.00 (Hardcover)

The focus of the volume on "Law and Process" provides a unifying theme for addressing many of the most pressing issues currently confronting environmental management in Canada.

The underlying premise of these essays is that process matters in environmental management. Whether one is concerned with incorporating environmental factors into decision-making on projects or policies, preventing pollution, ensuring sustainable resource development, or reconciling competing interests and priorities in land use, attention to process is essential to achieving policy objectives.

The essays are organized around six broad topics. These topics are: the environmental assessment process, the litigation process, emerging international processes, Canadian interjurisdictional processes, access to decision-making processes, and aboriginal and northern processes. The discussion of these topics provides both analysis of the current legal and policy context and insights regarding the likely evolution of environmental management in these areas over the coming years. This volume will therefore be of interest to policy-makers, lawyers, business people, consultants, academics, and members of non-governmental organizations working in the environmental field.

(New Publications Con't)

A Citizen's Guide to the Regulation of Alberta's Energy Utilities, by Janet Keeping, 1993, 75 pages.
ISBN 0-919269-40-4. $5.00

This Guide to Alberta public utility regulation has three primary purposes. The first is to describe how energy utilities in Alberta are currently regulated by government. The Guide discusses what public utilities are, why they need to be regulated, the process by which the rates charged by utilities are regulated, and how provincial laws control the construction and operation of utility facilities. The second purpose of the Guide is to alert readers to the ways in which the existing system of utility regulation is changing and the third purpose is to provide information on how interested individuals can get involved in the provincial processes for regulating utilities.

Order Information
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Institute News

New Board Member

The Institute has a new Board Member effective November, 1993.

Judith A. Snider is General Counsel with the National Energy Board in Calgary. Prior to becoming General Counsel in January 1992, she practised exclusively in the area of energy law with particular emphasis on regulatory law. She was an Associate with MacLeod Dixon and an Associate and, from 1987, a Partner with Code Hunter.

1993 Essay Prize Awarded

The Institute recently awarded its annual $1,000 essay prize to Mr. Richard King for his paper entitled "An Analysis of the Environmental Provisions in the North American Free Trade Agreement".

Mr. King is presently articling with the Toronto law firm of Davies, Ward & Beck. He has a Bachelor of Science (Biology) from the University of Western Ontario, a Bachelor of Laws from Osgoode Hall Law School, and a Master in Environmental Studies (Environmental Planning) from York University. This paper will be published in an upcoming edition of the Journal of Environmental Law & Practice.

Mr. King's paper was one of nine essays submitted to a Selection Committee composed of the Honorable Constance Hunt, Court of Queen's Bench; Phil Elder, a Professor in the Faculty of Environmental Design at The University of Calgary and Brian O'Ferrall, a lawyer with the firm Bennett Jones Verchere.

Students wishing to submit an entry for the 1994 Essay Prize should contact their Dean of Law.

Resources
No. 44 Fall 1993

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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