Resources

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The Free Entry System vs Government Regulation — The Clash of Old Methods with New Demands for Environmental Preservation

*Excerpted from Chapter 6 of Canadian Law of Mining by Barry J. Barton.**

The principles of free entry — the right to enter lands in pursuit of Crown minerals, the right to obtain a claim, and the right to go to lease and produce — are well embedded in the legislation of the main Canadian mining jurisdictions. The free entry system found in the legislation is comprehensible only against its historical background and through its evolution from the old free mining tradition, but it poses urgent questions for modern resource management. Free entry becomes an issue when land is withdrawn from mineral entry in order to devote land to another use, such as a park. It is an issue when private land is entered by mineral operators exercising their surface rights. ... Successes in native land claims remove minerals from free entry as part of the Crown estate and make them subject to new regimes. In these forms, free entry raises strong feelings in debates about resources and environmental policy.

The free entry system, also called the free miner or location system, permits the mineral operator to enter lands where minerals are in the hands of the Crown and obliges the government to grant exploration and development rights if the miner applies for them. In most cases, a prospecting licence or its equivalent must be obtained first, but it has always been freely available. If the applicant has met all the prerequisites for a claim or a mining lease, the minister has no discretion, but instead has a duty to issue the disposition. The other type of mining law may be described as a discretionary system and is used for hardrock minerals only in Alberta, Nova Scotia, and Prince Edward Island.[1] (It is used considerably more for other minerals such as coal and potash.) This type

Résumé

Le système du libre accès permet aux mineurs d'accéder à des terres où les droits miniers sont dévolus à la Couronne et d'y jalonner des claims ou encore de demander et de recevoir les droits miniers connexes. Ce système comporte des avantages distincts car, notamment, il encourage l'exploitation minière et stimule par le fait même l'activité économique. Cependant, ce système soulève des difficultés distinctes quant à la politique publique, comme la reconnaissance implicite de la prospection et de l'exploitation minières comme l'utilisation la plus valable, ne pouvant être supplantée par aucune autre. La soustraction des terres à l'aliénation et la réglementation environnementale qui se fait de plus en plus rigoureuse tendent à s'allier pour éclipser le système de libre accès. En dépit de l'évolution de la valeur des terres aux yeux du public et des méthodes d'exploitation minière, la législation minière continue de reconnaître les privilèges du mineur indépendant. Ce faisant, elle donne lieu à des attentes qui ne sont plus réalistes et décourage la remise en question de l'ancien ordre du monde.

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of law permits the government, as owner of the resource, to decide whether it will grant an application for exploration and development rights; the minister responsible has a discretion whether to issue a mineral disposition. The pace and location of mineral exploration and development is therefore subject to considerable government control.

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Any attempt to appraise the free entry system is complicated by the polarization of opinion that the subject attracts. It is inevitable, and ought not to be concealed, that one's values and politics will colour one's views of the system and its impact on government. The proper relationship between government and the private sector is very relevant. Corporations seek stability in the regulation of economic activity, while governments are pressed to respond to challenges that keep changing. In addition, there are different perceptions of the role that the government should play as manager of Crown lands. Also relevant are beliefs about the proper harmonization of economic development and environmental conservation, that is, whether the emphasis in "sustainable development" should go on the first word or the second.

The mining industry is firm in its loyalty to the free entry system. One explorationist has said that the right to acquire absolute title to minerals and the absolute right to mine are essential, and that legislators must be encouraged to provide those rights in order to secure a solid future for mining in Canada.[2] Others in the industry stress the need to maintain access to land to assure a continuing supply of economic deposits and the need to prevent land from being frozen or locked up by prohibitions on mineral exploration.[3] In the mid-1970s in British Columbia, the concern was less with the first element of the free entry system and more with the third, when the Barrett government removed the automatic right of a claimholder to obtain a lease in order to mine a deposit that he or she had discovered, and required a production plan to be submitted for approval by the Minister. Defenders of the industry pointed to the industry's record of achievement and its major contribution to the economy. They urged that in order to maintain such progress, mineral leasing policy must remove ministerial discretion as a prerequisite to the issue of a mining lease and as a potential means of suspending it, except in the case of non-compliance with the terms of the lease.[4]

It is entirely reasonable to argue that the business climate for mining can be chilled by adverse government action, and that the introduction of unpredictability into the legislation is a serious kind of intervention. Further, the removal of a block of land from mineral exploration involves a cost in terms of the opportunity foregone to develop its mineral potential. Indeed, there can be no doubt that the free entry system is more completely designed to encourage mining activity than are other resource disposition systems. It is difficult, however, to demonstrate how far any specific change in the mineral legislation is responsible for a change in business activity. It can also be argued that Canadian resource industries seem to put more store in political predictability than the wording of legislation as a measure of security of title.[5]

One of the merits of staking claims on the ground is that the pattern of ownership is visible on the spot rather that in government records miles away. It is the ultimate in decentralized recordkeeping. There is virtue in a system that puts government paperwork in second place. Where there is a discrepancy between what is recorded in the office and what is on the ground, the latter prevails. This is to the benefit of low-budget operators who do much prospecting, staking, and exploration work, for they can be sure of the ground to which they have acquired title without spending a lot of money on surveying. They do not run the risk of doing their assessment work on someone else's property. Even for larger operators, the rate of turnover of claims points to a simple system of acquiring title and not an elaborate one. For all explorationists, moreover, competitive staking situations (by no means a rarity) demand that one must be able to acquire title to land immediately.

While the free entry system has distinct advantages for the private sector, it creates distinct difficulties in terms of public policy. The rule that a mineral disposition must be granted wherever it is sought constrains the discharge of government responsibilities.[6] There may be excellent reasons why there should be no mineral activity in a given district or in a particular place. Under the free entry system, the government must use the power to withdraw the land from staking, but this can only occur if the legislation makes the power available for the particular purpose required and if it is resorted to in time. Sometimes the reasons why a place should not be used for mineral work do not show up until the possibility of that work first arises. *Halferdahl* v. *Whitehorse Mining District*[7] shows that even a government land management purpose as obvious as the settlement of native land claims may be hindered by the need to find clear authority for a withdrawal.

Likewise, the free entry system provides no opportunity to impose terms and conditions, at least in the case of mining claims. Under systems that permit them, such conditions can be a useful means of dealing with concerns that vary from case to case. They are used to good effect in disposing of oil and gas rights and hardrock mineral rights in Alberta. Concerns about the particular locality, which are exposed in the course of an inter-agency referral process in advance of the grant of the

disposition, are made the subject of conditions that the licensee or lessee must observe.

The other manner in which this free entry restricts government management powers is through the rule of priority on the basis of time of staking. This rule prevents the government, as proprietor of the resource, from choosing among applicants on any other basis. There are other ways to dispose of resources; for example, cash bidding for properties, such as is the norm in oil and gas, may occasionally be suitable.[8]

Apart from the effect of the free entry system on government authority, one must also have regard to its effect on conflicts between different resources and land uses. The free entry system assumes that mining is to have priority over competing uses of land and resources.[9] The miner's right to enter on lands containing Crown minerals is broad enough to permit the miner to enter and take possession of land that is of value or under use for many other purposes. The exceptions are the land uses that the mining acts declare to be closed to mineral activity: land under buildings, land under crops, and the like. The priority given to mining in all other cases is best seen in contrast to the procedures of the allocation of other resources. As we have noticed, minerals are the only resource that can be appropriated and exploited under a title that is obtained from the Crown as the result of one's own acts. Timber rights, oil and gas rights, fishing rights, and trapline and outfitting rights are all issued by the government only after a discretionary decision to do so. Before the decision is made, there is an opportunity for the government to consider the land and resource use concerns that the application raises, engage in resource use management, and minimize resource use conflicts. The impact of one resource use may be evaluated and balanced against the others. However, when mineral rights are granted, there is no such opportunity and no such balancing. If people are interested in procuring mining claims in some area, then resource management and land use planning efforts must work around the claims.[10]

...

The effects of the free entry system on government authority and resource management cause the mineral policy of free entry to be a source of dissatisfaction to people outside the mining industry. At the same time, people inside the industry are also dissatisfied and feel anything but privileged over other land users. How has this come about? Much of the mineral industry discontent may be traced to land withdrawals and to environmental regulation.

... The powers of the government to withdraw land are broad and discretionary, whether they are powers under the mining legislation or other legislation. These powers have been available for a long time, but the concern of the industry in the 1990s is that they are being used much more than ever before, to the extent that major portions of the land base are becoming off-limits to mining. When land is withdrawn, it escapes the free entry system. However, under this system, withdrawal of land from staking becomes a necessary instrument of management, however blunt it may be. Denied the option of refusing applications for mineral disposition, the government must resort to withdrawals to reach policy goals such as to create new parks or protect sensitive watersheds, and even to do something as prosaic as protect electrical transmission lines. Withdrawal is clumsy because it generally prohibits all mineral activity, even though in some circumstances limited mineral activity might not interfere with the other values being protected. The withdrawal must also be done in advance of any staking; legislation does not permit the outright cancellation of claims merely because their location has subsequently been withdrawn. The only option then is to use another blunt instrument and expropriate the claims. The withdrawal of land, whatever its failings, is frequently necessary to limit the effect of the free entry system.

To the mechanism of withdrawal of land from staking must be added the increasingly numerous mechanisms that, for environmental purposes, regulate the way that mineral exploration and development are carried out. Some statutory controls aim specifically at mineral activity. We have already considered the introduction of controls on exploration activity, which previously had been regulated only if it attracted other regulation by involving tree-felling, discharges of effluent into water, or the like. In addition, many jurisdictions are submitting mine development projects to formal public and compulsory environmental impact assessment procedures. Other statutory controls are of a general character, affecting all activity on Crown lands or all activity that entails pollution or the handling of dangerous substances. Coping with these controls is a larger and larger part of the work of a mineral operator.

The combination of land withdrawal and ever tighter environmental regulation tends to overshadow the free entry system. Writing of precisely the same trends affecting activity on United States federal lands under the Mining Law of 1872, John Leshy comes to a thought-provoking conclusion:

> The inevitable result is that government discretion and control have displaced free access and private decisionmaking under the Mining Law to an extent far greater than either the federal agencies or the mining industry now wish to admit.[11]

The reality is that the regulatory controls of the modern administrative state often loom larger than the acquisition of proprietary rights from

that state. However, it is probably correct to conclude, as does Leshy,[12] that the regulatory controls have by no means eclipsed the free entry policy. What we are left with is a tension between regulation and free entry. The advocates of each of them feel that the other has somehow got an unfair advantage.

...

While the mining industry is inevitably concerned with any deterioration in its business climate, its perceptions must also be understood in reference to the history of the free entry system. One can see the free entry system as a covenant between the mining community and the government or wider community. Historically, the covenant was that the miner would be the pioneer and would open up the wilds, the untamed and forbidding wilderness. The miner would be the first agent of settlement and would push back the frontier, permitting other settlers such as farmers to follow in due course. The miner would seek out and develop the resources of the new lands and would create new wealth. In return, the miner sought little. The main concern was to be left alone by the government, especially (in the early days) in financial terms. The implicit covenant by the government was that the fees and royalties extracted from mining would not be large. The government's main duty was to provide a stable legal framework and to provide mining laws that would encourage the industry, especially the small prospector.

The premises on which the parties entered into this covenant in the nineteenth century have changed. Above all, our concept of wilderness has changed.[13] Originally, we thought of Crown lands as the "waste lands of the Crown." They were threatening, the antithesis of civilization, and, for all practical purposes, infinite. Since they were useless in their present state, they could readily be dedicated to the fostering and nurturing of the mineral exploration industry. There was no need to set aside land as parks, and there was no perceived need, in the light of the small scale of mining operations and the simple technology being used, to control pollution or insist on reclamation.

Now we are aware of the value of wilderness and undeveloped land for a multitude of purposes such as wildlife habitats or recreational and tourism resources. There are other values besides mineral exploration that need nurturing. The public is conscious of its ability to threaten the wilderness and indeed to threaten the welfare of the environment on a planetary scale. The wilderness no longer seems infinite; road networks gradually extend further, and there are few places where one person's activities will not be seen as affecting the interests of other persons. The reality is that the frontier has closed.

Mining has changed also. Much exploration work is now done by companies carrying out large regional programs. Even the sole prospector uses aircraft, government geological, geophysical, and geochemical reports, claim maps, and sophisticated methods that were not available to his or her predecessors. Fewer and fewer economic deposits are discovered from surface outcrops alone.

Notwithstanding all these changes, mining legislation still affirms the covenant with the free miner. It still declares, without reservation, that the miner is entitled to explore, to stake a claim, and, as lessee, to mine. In doing so, the legislation raises expectations that are no longer realistic and discourages the reconsideration of the old view of the world. To the guardians of mining interests, restrictions such as land withdrawals and discretionary controls on going to lease are breaches of the covenant. To the guardians of other interests, the covenant is one that expired along with the world in which it was made.

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Notes

1. Of these provinces, only Nova Scotia hosts hardrock mineral activity. In 1990, Nova Scotia had 2 of Canada's 126 metallic mining establishments - *Mining in Canada: Facts and Figures* (Ottawa: Mining Assn. of Canada, 1991) Table 1.

2. R. Tays, "Mining Acts of Canada: Foundation or Pitfalls" (Paper presented at the Prospectors and Developers Association Convention, Toronto, March 1989).

3. In submissions to the federal Minister of Energy, Mines and Resources in 1989, the Prospectors and Developers Association of Canada (PDAC) said: "There is a gradual but continuous loss of land available in Canada for prospecting and exploration. The PDAC solicits the support of the federal department of Energy, Mines and Resources in promoting the adoption of multiple land-use strategies and educating the public and other federal departments as to the industry's rapidly evolving environmental sensitivity" - *Prospectors and Developers Association of Canada Digest*, Winter 1989-90.

4. J.L. McPherson and O.E. Owens, "Mineral Leasing in a Private Enterprise System" in M. Crommelin and A.R. Thompson, eds., *Mineral Leasing as an Instrument of Public Policy* (Vancouver: University of British Columbia Press, 1977) 227 at 236.

5. A.R. Thompson, "Legal Characteristics of Disposition Systems: an Overview" in N. Bankes and J.O. Saunders, eds., *Public Disposition of Natural Resources* (Calgary: Canadian Institute of Resources Law, University of Calgary, 1984) 1.

6. M. Crommelin, "Mineral Exploration in Australia and Western Canada" (1974) 9 U.B.C. L. Rev. 38 at 54.

7. [1992] 1 F.C. 813 (C.A.). [In this case, t]he government wished to set aside certain Crown land because it might be needed for a native land claim settlement. The government did not want alienations of the land to occur in the meantime. It could not reserve the land from mineral activity simply by telling the

recorder to stop issuing mineral claims because miners had their statutory right of access to prospect, stake, and explore. It was obliged to find a specific power in the Act to overcome that right. The Federal Court of Appeal held that such a power could be found for this purpose in the Act, although it was a close call. The language in issue was difficult, and the Court below had come to the opposite conclusion.

8. B.C. allows the Department to sell reverted Crown-granted mineral claims by auction or tender - Mineral Tenure Act Reg., B.C. Reg. 297/88, s. 8.1. In 1990, the province netted $280,000 by sealed-bid sales - British Columbia Ministry of Energy, Mines and Petroleum Resources, News Release, "Vancouver Mineral Claims Sale" (1 April 1990).

9. See Crommelin, *supra* note 6.

10. The free entry system is fundamentally at odds with an initiative such as that of the B.C. Commission on Resources and Environment's *Report on a Land Use Strategy for British Columbia* (Victoria: Queen's Printer for British Columbia, August 1992) (Commissioner: S. Owen) for negotiated and mediated decision-making. Mining statutes still embody the free entry system even where they contain general statements of purpose to promote sustainable development or to minimize environmental effects.

11. J. Leshy, *The Mining Law: a Study in Perpetual Motion* (Washington D.C.: Resources for the Future, 1987) at 221.

12. *Ibid.* at 189-90.

13. For a valuable analysis of attitudes to wildlands or wilderness, see J.G. Nelson, "Canada's Wildlands: Three Traditions in Conflict from a Sustainable Development Perspective" in M. Ross and J.O. Saunders, eds., *Growing Demands on a Shrinking Heritage: Managing Resource-Use Conflicts* (Calgary: Canadian Institute of Resources Law, 1992) 48.

Recent Developments in Canadian Oil and Gas and Mining Law

*by Susan Blackman**

(prepared for the Rocky Mountain Mineral Law Foundation Newsletter, printed with permission)

Oil and Gas

Fiduciary Obligations -- Area of Mutual Interest Clause

In 1985, E and N entered into an exploration agreement. At the same time, E, N, and P (the principal of E) entered into a Services Contract whereby P was to provide geophysical consulting services to N, the operator. This contract incorporated the 1981 Canadian Association of Petroleum Landmen Operating Procedure (CAPL) and it governed the relationship of the parties after the original exploration agreement expired in 1986.

The Services Contract contained a clause which specified the rights of the parties as regards participation in prospects developed within the area covered by the contract and in other parts of Alberta. That clause also defined an area of mutual interest (AMI) of one mile around any such prospect which would last for one year.

The Services Contract expired on November 1, 1988. In that month, P wrote to N enclosing a list of prospects that had already been identified stating that the two companies would "continue to be bound by the AMI provisions of [their] joint venture agreements" and reducing the AMI term to six months. In the next six months, P communicated with N on two occasions about properties that were not on the list but were within one mile of some prospects on the list. N did not object to P's November 1988 letter nor raise any question about P's interpretation of it. Within the six months, N acquired interests within one mile of prospects on the list but failed to give E any opportunity to participate. At trial, N argued that the listed prospects were themselves the AMI prospects.

Hunt J., held that P's interpretation of the letter was the reasonable one. Furthermore, N owed a fiduciary obligation to E as regards prospects subject to the AMI clause. Therefore, E was to be given a chance to participate in these prospects. Hunt, J. held that the interest E might have taken up in N's prospects was held by N in a constructive trust for the benefit of E. In order to make its decision whether to participate, E was entitled to all the relevant data that N had about the prospects. If E was limited to the data available at the time it should have made its choice (as N argued), fiduciaries in N's position would have no motivation to comply with their obligations. The same result would apply years down the road as would have applied had the fiduciary duty been fulfilled as originally required. The fiduciary would suffer no loss. On the other hand, the beneficiary would have to make its decision to participate without any knowledge of proven losses and without having had the chance to influence decisions regarding development of the properties. E was given 30 days to examine N's data and to elect to participate. If it should so elect, its participation would earn it a share of the net production revenues to date with interest subject to payment of its share of expenses if payout had not yet been achieved. *See Erewhon Exploration Ltd.* v. *Northstar Energy Corp.*, [1993] A.J. No. 916 (QL).

Fiduciary Obligations -- Operating Agreement -- Accounting Obligations

The relationship between N (the operator) and E (a non-operator) was governed by the 1981 CAPL Operating Procedure (CAPL). E alleged that N had acted inappropriately with regard to accounting matters. N claimed first that the operator would never be liable to non-operators for accounting matters unless it failed to follow "good oilfield practice" as set out in Clause 304 of CAPL. Hunt, J. held that this is a general standard and each claim should be analyzed in its own context. Such a general standard would come into play only if there was no specific standard appropriate to the case and if there were no fiduciary duties involved.

Pursuant to CAPL clause 401 dealing with liability and indemnity, N also argued that the operator was only liable to the non-operators for gross negligence and not for ordinary negligence. Hunt, J. took exception to this argument and construed the clause to be aimed at liability of the parties to third parties. That is, all the parties to the agreement would be liable to third parties for damage even if that damage occurred due to the negligence of the operator, unless the damage was of a type against which the operator was required to insure, or if the operator was grossly negligent in causing the loss. To allow this clause to excuse the operator's behaviour vis-a-vis the non-operators would "give the operator a sort of tyrannical role in relation to the non-operators", something not consistent with "a reasonable commercial interpretation of CAPL".

Consistent with earlier cases, Hunt J. held that the operator is acting as a fiduciary when it is spending the money provided by the non-operators. In this case, four claims were made, two involving sums of money spent in non-arm's length transactions. The first related to overhead and related fees charged to the joint account by N as paid under a contract with itself. The second involved well-drilling costs paid to N's sister drilling company. In both cases, N was held to have breached its fiduciary duty and therefore E was able to recover some of these costs.

In the final two claims, E challenged one of N's decisions regarding a production problem, and E claimed reimbursement of royalty overpayments. With evidence as to how it estimated the costs of dealing with the production problem, the judge was satisfied that N had acted as a prudent operator and had discharged its fiduciary duty. The royalty overpayments arose because royalties had been paid out with no deductions for pipeline and equipping costs that were charged to the joint account. N demonstrated successfully that long-term costs such as these would be deducted on a depreciated basis over 15 years. Along with further calculations, N showed that the overpayment owed E was less than $200.00, an amount deemed *de minimus* by the judge. *See Erewhon Exploration Ltd.* v. *Northstar Energy Corp.*, [1993] A.J. No. 916 (QL).

Gas Marketing -- 1981 CAPL Operating Procedure -- Fiduciary Obligations

Clause 601 of the 1981 CAPL Operating Procedure (CAPL) provides that each non-operator is to take its share of the production from a well operated for the joint account. Clause 602 provides that when a non-operator does not take its share in kind, the operator has the authority to sell the operator's share for the same price the operator receives for its own share, or to buy the non-operator's share for its own use at the prevailing field price. In *Erewhon Exploration Ltd.* v. *Northstar Energy Corp.*, [1993] A.J. No. 916 (QL), the defendant (N) had been buying the plaintiff's (E's) share of the gas production, formerly paying the same price which N received for its own gas under its long-term contracts. In July 1990, N gave E notice retroactive to June that henceforward the spot price would be paid for E's gas, a price generally lower than the price E would have received under the old policy. N then resold the gas under its own contracts and made a profit. E argued that the limitation on the first option in clause 602, that is, that the operator must sell the production for the same price it receives for its own share, also applied to the second part of clause 602. Therefore, N should have paid a higher price for the gas than the spot price. Considerable evidence was presented about the conduct between the parties and about the conduct prevailing in the oil industry in recent years. Since deregulation in 1985, with greater competition for markets some operators have felt entitled to buy gas at the spot price from non-operators and resell it themselves at a profit. Of course, non-operators have taken the opposite view, and disputes have been resolved by non-operators taking their share in kind, or by operators charging a marketing fee to sell the non-operator's gas, or by operators paying a price higher than the spot price but lower than the long-term contracts under which they sell their own gas. Much additional evidence was put forward to show that the history of dealings between the parties had been a cooperative one, with E making many efforts to find markets for the gas and sharing those markets with N. In addition, evidence was put forward by N to show that it had invested considerable time and effort in developing its markets and therefore it should not share the benefit of its long-term contracts with E. However, this evidence was non-conclusive, therefore, the issue was to be resolved solely on the legal interpretation of clause 602 itself. Hunt, J. held that there is no limit on what the operator may do with the non-operator's gas that it buys under clause 602. She also held it would not be fair to require N to give E the benefit of the long-term contracts without E having to provide any

corporate guarantees, indemnities or letters of credit, all of which had been given by N to secure the long-term contracts. Hunt, J. also held that the operator was not in a fiduciary relationship when it bought the non-operator's gas under this clause, although it might well be in a fiduciary relationship in other marketing circumstances such as when it sells gas for the non-operator's account (as under the first option of clause 602). The fiduciary relationship was also not established because the critical element of the plaintiff being vulnerable to the defendant was not made out. E tried to show it was vulnerable because N had "control of the taps" and could refuse to supply E's gas in kind. Since all the evidence pointed to the contrary conclusion, the element of vulnerability was not proved.

E also argued that N had a duty of good faith that required it to give E the benefit of its markets. Hunt, J. held that N had no intentions that could be described as bad faith. (Note that whether the defendant's motives should be considered in determining whether a good faith duty has been breached is an issue currently before the Alberta Court of Appeal.) Furthermore, N exercised rights available to it under the contract and did not act in a way contrary to community standards of honesty, fairness or reasonableness. E did succeed on the point that N should have given reasonable notice that it was going to change its pricing policy. Hunt, J. decided that two months notice was required, therefore, E was entitled to be paid under the old policy until two months after the notice had actually been given.

Among changes made to clause 602 in the 1990 CAPL Operating Procedure, the operator is now permitted to purchase production for its own account at a "market price" (instead of the "field price"). *See*, J.A. MacLean, "The 1990 CAPL Operating Procedure: An Overview of the Revisions" (1992), 30 Alta. Law Rev. 133 at 157.

Mining

Claim Staking Disputes -- Substantial Compliance -- B.C.

The B.C. Court of Appeal has granted leave to appeal the decision of the B.C. Supreme Court in *Ecstall Mining Corp.* v. *British Columbia*, reported in *Resources* No. 39. See *Ecstall Mining Corp.* v. *Tagish Resources Ltd.*, [1993] B.C.J. No. 2571 (QL) and [1993] B.C.J. No. 623 (QL).

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

On September 30, 1993, the Supreme Court of Canada refused an application for leave to appeal the Ontario Court of Appeal's decision in *Ontex Resources Ltd.* v. *Metalore Resources Ltd.*, reported in *Resources* No. 43.

Canadian Exploration Expenses – Taxation -- "Mine" and "Mineral Resource"

Preliminary expenses incurred in assessing a mineral resource that do not relate to a mine or an extension of a mine may be claimed as Canadian exploration expenses. Also, development expenses for a new mine can be claimed as Canadian exploration expenses where they are not for the purpose of bringing into production a mineral resource that has already yielded production in reasonable commercial quantities. In *Oro del Norte S.A.* v. *Canada (Minister of National Revenue)*, [1993] F.C.J. No. 304 (QL), the plaintiff sought to claim the exploration and development expenses of an underground coal mine that exploited a coal seam that had already been mined from the surface to the extent possible. The judge looked at various factors and concluded that the underground mine was not an extension of an existing mine because the planning contemplated a project financially and otherwise separate and distinct from the surface mine, the plans for the underground mine contemplated expenditures nearly as great as the money that had been spent on all the surface pits together, the coal in the underground mine was beyond the limits of economic recovery by known surface mining methods, the staff for the underground mine required special certification for their work so that they were not interchangeable with the work force for the surface mines, all the equipment and services used in the development of the underground mine were different from those used for the surface mine, entirely different safety conditions for the two mines dictated different support services, and the underground mine was planned so as to leave a safety barrier of ground between the two mines. Therefore, the judge concluded that the preliminary expenses claimed were Canadian exploration expenses and were not incurred in relation to an existing mine or an extension of a mine.

With regard to development expenses, the issue turned on whether economic feasibility of recovery should influence the definition of "mineral resource". The judge held that although the geological facts might indicate this coal seam was a single mineral resource, the correct interpretation was that a mineral resource is a portion of the resources of interest to a geologist. That portion is delineated by economic factors and by the mining methods, that is, "mineral resource" refers to the part of a mineral reserve or coal deposit that is recoverable in a particular development project. Therefore, the development expenses for the underground mine could be claimed as Canadian exploration expenses.

REGISTER NOW!

Oil and Gas Issues Update

Canadian Petroleum Law Foundation Mid-Winter Conference

March 7, 1994 Westin Hotel, Calgary

The Canadian Petroleum Law Foundation Mid-Winter Conference will be held on March 7, 1994 at the Westin Hotel in Calgary. Presented by the Canadian Petroleum Law Foundation, in cooperation with the Canadian Institute of Resources Law, the conference promises to be an extremely worthwhile event. Recognized experts will address a range of topics including:

- changes in gas contracting practices in the context of appropriate management of both the physical and financial aspects of the natural gas transaction;
- current developments and insight into evolving environmental compliance issues for the oil and gas industry; and
- an update of Canadian and US regulatory issues including a discussion of recent key decisions.

Program

8:00-8:30	Registration (Britannia Room)
8:30-9:30	Management of physical and financial aspects of the natural gas transaction Presented by: Mark Searles, President, Enron Gas Marketing
9:30-9:50	Coffee Break
9:50-10:50	The New Environmental Approvals Process under the Alberta Environmental Protection and Enhancement Act Presented by: Scott Rusty Miller, Senior Regulatory Counsel, Petro Canada, Calgary
10:50-11:50	Canadian and U.S. Regulatory Issues Update Presented by: Lawrence E. Smith, Partner, Bennett Jones Verchere, Ottawa
12:00-1:30	Luncheon (Belaire Room) Keynote Speaker: David J. Manning, Q.C., Deputy Minister, Department of Energy, Government of Alberta

Registration Information

The Conference will be held in the Britannia Room, Westin Hotel, 320 - 4th Avenue SW, Calgary, Alberta. The registration fee is $160.50 ($150.00 + $10.50 GST) (CPLF GST Registration Number R105201289). This includes attendance at all sessions and lunch. Please forward your cheque (payable to the Canadian Petroleum Law Foundation) to: Canadian Institute of Resources Law, Room 3330 PF-B, The University of Calgary, Calgary, Alberta, T2N 1N4. If time does not permit registration by mail, you may register by telephoning the Institute at (403) 220-3974 or by faxing your registration to (403) 282-6182.

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