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Water Law Reform in Alberta: Paying Obeisance to the "Lords of Yesterday", or Creating a Water Charter for the Future?[1]

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> Water is fundamental to life and all living systems. The essential importance of water places a special value on the manner in which decisions are made respecting its use and availability.
>
> Sarah Bates et al, *Searching Out the Headwaters: Change and Rediscovery in Western Water Policy*.

> If I were called in
> To construct a religion
> I should make use of water.
>
> Philip Larkin, "Water", *Collected Poems*.

In 1991 Alberta initiated a review of the provincial *Water Resources Act* (WRA).[2] Following an opportunity for public comment, Alberta Environment released a discussion draft of the proposed new *Water Conservation and Management Act* (the Draft Bill) in the summer of 1994.[3] Since then, the Water Management Review Committee appointed by the then Minister of the Environment, Brian Evans, has been touring the province seeking public input on the draft. That Committee is expecting to submit its report to the new Environment Minister, Ty Lund by the end of May 1995.

The Draft Bill is long and complex; it is spread over 169 sections and 185 pages of text. Consequently, in what follows, I make no claim to provide a comprehensive review of the Draft Bill. Instead, I have chosen to focus on a limited number of issues that seem to me to be of critical importance in assessing the extent to which this legislation will meet our needs in the twenty first century. These issues are: (1) the linkage between instream flow protection and the grandparenting of existing licences, (2) the scheme proposed for the transfer of licences, and (3) a discussion (under the heading "the road not taken") of certain issues that have not been addressed by the Draft Bill (water metering, water charges and aboriginal water rights). My comments conclude with a reference to the "purposes clause" of the Draft Bill.

Résumé

Le gouvernement albertain envisage de remplacer sa législation actuelle sur les ressources en eau, soit la *Water Resources Act* et a fait circuler un projet de loi aux fins de commentaire et de discussion. L'auteur soutient que l'objectif de ce projet de loi devrait être, pour le siècle prochain, de doter l'Alberta d'une Charte de l'eau ainsi que d'encourager une utilisation écologiquement durable des ressources en eau de la province. L'auteur critique le projet de loi et examine notamment la clause d'antériorité des permis existants et la manière dont sont traités les besoins relatifs au débit de l'eau. Il se penche également sur les questions de tarification et de mesurage de l'eau, le tranfert des permis, les droits de jouissance de l'eau des Autochtones et la clause définissant l'objet de la loi. L'auteur conclut qu'il est nécessaire de modifier le projet de loi à plusieurs égards si l'on veut se doter d'une Charte de l'eau susceptible de remplir nos besoins pour le siècle prochain.

My assessment of the Draft Bill is informed by an assumption that long-run sustainability of the resource requires that we recognize that water allocation decisions must be considered in a broader ecological context than is mandated by the current WRA. The point has been put particularly well by the authors of a recent and provocative study of water policy in the western United States entitled *Searching Out the Headwaters*. In discussing the principle of conservation, the idea that water should be used with care, the authors noted that:[4]

> Today, conservation comprehends a wider view of resources. The focus is no longer exclusively on fulfilling immediate human wants. There is a deeper recognition that humans are part of a larger system and are obliged to conserve natural resources for their own good as well as well as the good of future generations and other species.

The Current Scheme

The current *Water Resources Act* is a prior appropriation statute, the framework of which can be traced back directly to the *North West Irrigation Act* of 1894.[5] That dominion statute, drawing heavily upon the water law of the western United States, was informed by the conclusion that English riparian law was unsuited to the relatively arid conditions of the southern prairies. The criticisms of riparian rules are familiar: riparian rules did not allow for offstream use; consumptive uses (such as large scale irrigation) that caused a substantial diminution in flow were restrainable; and, since in the event of a drought, the rules did not accord one user priority over another, all might suffer equally and perhaps disastrously. Certainly, it was thought, nobody would invest in the development of a capital intensive irrigation system, given a set of riparian rules.

Prior appropriation statutes are designed to provide priority to the first licensed appropriators over all other users. In Alberta this is achieved through s.35 of the Act. Licenses are issued for particular purposes and appurtenant to particular land which does not need to be riparian land. Although there is an assumption that water diverted pursuant to the Act not be wasted, there is no statutory adoption of the doctrine of beneficial use that forms a part of U.S. water law. In sum, the WRA and its predecessor statutes were designed to meet the needs of a frontier community,[6] not the needs of a post-industrial conserver society. In 1962[7] the scheme of the statute was extended to replace the ground water law of the province which had hitherto been based upon the rule of capture of the English common law.[8]

Overview of the Proposed Scheme

The Draft Bill is divided into eleven parts: Part 1, responsibilities of the Minister and consultation and co-operation requirements; Part 2, Planning and Environmental Assessment; Part 3, Right to Divert and Priority of Rights; Part 4, Approvals, Licences and Preliminary Certificates; Part 5, Transfer of an Allocation Under a Licence, Part 6, Water Management Works, Undertakings and Flood Risk Areas; Part 7, Remedial Measures; Part 8, Notice and Environmental Appeal Board; Part 9 Enforcement, Part 10, General Administrative Matters and Part 11, Transitional. The substantive water law, the heart of the Act, is found in Parts 3, 4 and 5. Within those three parts, the basic scheme of the Draft Bill is tolerably clear.

First, the Draft Bill will continue the existing prior appropriation scheme (s.28(1)). To that end, existing licences are to be provided with comprehensive protection.[9] New licences are to be issued for a specified period (s.52(7)) rather than following the current practice of issuing perpetual licences. The concept of instream flow needs[10] (IFN) is given explicit recognition in the draft Bill, but the protection offered to IFN is severely attenuated by the grandparenting of existing rights.

Second, no person may carry on "an activity"[11] (works, undertakings etc) in relation to water without an approval (Part 4, Division 1). Similarly, no person may divert water without a licence[12] or except where permitted "under the authority of the Act" (s.49). The Draft Bill authorizes persons who own or occupy land adjoining water to divert without a licence for "household and related purposes"(s.25) and, in fact, indicates that such persons cannot obtain a licence for that purpose (s.25(1)(b)). Riparian diversion rights (and riparian rights are clearly not abolished (s.26(3))) are limited to these domestic use rights. The right of a riparian owner to commence an action against other diversions is limited to actions against those diversions which are "unauthorized or unlicensed".

Third, the Bill provides a process for authorizing the transfer of water allocations either permanently or for a fixed period of time (s.82).[13] This is a significant change from the current WRA since, under that regime, licences are issued for a specific purpose and are appurtenant to specific land.[14] Furthermore, in order to satisfy water conservation requirements (such as IFN), up to 10% of the applied-for transfer of the water allocation may be held back and a licence issued to the Crown for that allocation.

Fourth, a licence that permits the use of water outside the province,[15](s.47) or that permits the transfer of water between "major river basins" (s.48) may only be authorized by a special act of the legislature.

The Draft Bill does not take a position on a number of contentious issues including issues of pricing, metering and the question of aboriginal rights to water. I offer some comments on these issues below, but before doing so I propose to offer a more detailed critique of the grandparenting, IFN and transfer issues.

Grandparenting Existing Licences and IF Needs

The Draft Bill proposes comprehensive protection for existing licences. The basic statement of grandparenting is found in s.24 of the Draft, but the extent of the grandparenting is only made clear by s.28(5) which deals with the priority of instream flow licences. Indeed, the two issues of grandparenting and IFN are inextricably linked.

Section 24 provides that:

> Every person who on [proclamation date] was entitled to the diversion of water[16] by virtue of an authority, permit, interim licence, or licence granted under the *Water Resources Act, Irrigation Act* (Canada),[17] the *Dominion Lands Act* or the *Dominion Power Act* may continue to exercise the right in accordance with the terms and conditions on which it was granted, and this Act applies to that right *as long as this Act is not inconsistent with the terms and conditions on which the right was granted.* (emphasis supplied).

This section offers very broad protection to existing licensees. Not only are the licences continued, but they are only to be subject to the new Bill, provided that there is no inconsistency between the licence and the Bill. To the extent that there is an inconsistency, the licence will prevail, not the Bill. While much may depend upon the terms and conditions of individual licences, it might, for example, be impossible to charge an old licensee a royalty upon the use of water.

One of the more interesting policy questions posed by the Draft Bill is that of whether or not existing licences should be subject to the elements of the IF licensing regime proposed by the new bill. Steven Ferner has identified six methods within the Draft Bill for protecting IF requirements.[18] I shall discuss two of these techniques: (1) the IF Licence (which I shall discuss in this section) and (2) the 10% holdback on transfers, discussed in the next section. The Draft Bill contemplates that licences for IF requirements may be issued, on application, to the Crown.[19] It is clearly the intention that licences should only be issued following a scientific assessment of the need for such a licence. Once issued, an IF licence is accorded a very high priority. Section 28(5) provides that such a licence shall have priority over any other licence "issued at any time under this Act" except for another IF licence. It is critical to notice that this priority does not extend to licences that are issued **before** the Draft Bill comes into effect. In the result therefore the current Draft Bill places the private interests of existing licensees ahead of the broader goal of ecological security for all.

There is a very strong argument for suggesting that **all** licences should be subject to licensed IF requirements. In part the argument is pragmatic, that is, if senior licences are not subject to IF requirements, instream flow needs simply cannot be adequately protected for those waterbodies for which there has already been an over-allocation.[20] A more principled approach, drawing upon elements of U.S. public trust law,[21] would be to assert that all licences, whenever issued, have always been subject to the implied limit that they are subject to the natural ecological requirements of the watercourse.[22] A licence no more gives a right to destroy, or seriously impair, natural habitat by abstraction, than it gives the right to destroy by pollution. While such an approach would create some uncertainty for senior licensees this could be kept within reasonable bounds by insisting, as does the Draft Bill, that only **licensed** IF requirements will take precedence over existing licences. Existing licensees can take comfort from the fact that the process envisaged for issuing Crown IF licences is both transparent and based upon scientific criteria. They might take further comfort from the fact that IF licences can only be issued to the Crown.

While this limitation may provide comfort to existing licensees in the event that they are made subject to IF licences, it is, in my view unduly restrictive. Governments are rarely the first to act to protect ecological values and therefore, at the very least, a private party should have the right to initiate consideration of the matter. This right to initiate the application would strike to the heart of the issue. It is probably more important than the question of who is the registered holder of the licence.

Transfers

Under the WRA, licences are not transferable. Under the Draft Bill, licences when issued, will be appurtenant to particular property. However, under Part 5 of the Draft, it is envisaged that an allocation of water under a licence may be transferred upon the approval of an application by the Director (the person responsible for the operation of the Act[23]). The Act prescribes a number of factors that the Director may consider in determining whether or not to grant an application. These include the effect of the transfer on other licensees and its effect on the aquatic or natural environment. Where the Director "is of the opinion that there is

a need" the Director may withhold up to 10% of the allocation that is sought to be transferred and may issue an IF licence to the Crown for that holdback.

Some commentators have welcomed this proposal as an innovative way of both encouraging conservation and dealing with the IF problem in waterbodies that are already fully allocated. Here are some of the arguments that can be made in favour of the proposal.

1. The right of a licensee to transfer part of its allocation will encourage it to introduce modern conservation techniques so as to produce a "surplus" that can be transferred. Thus there will be an incentive to line irrigation ditches[24] and to introduce irrigation methods that use less water.

2. The operation of the market will tend to ensure that this scarce resource is allocated to its highest and best use.

3. Instream flow needs can be met, over time, without interfering with the "vested rights" of existing licensees (i.e. licences issued under the WRA or predecessor legislation). This claim perhaps requires a further explanation which goes something like this: licences issued under the WRA or predecessor legislation are strictly appurtenant to particular land; insofar as the Draft Bill allows for transfers it therefore accords an option to existing licensees that is not currently available; the opportunity to transfer is strictly an option but one which is on terms that may provide for a holdback; since the transfer is an additional option and not a right, the licensee cannot characterize the holdback as a taking for the purpose of triggering expropriation principles.[25] For the most part I believe that these arguments are valid, but I think that the specific proposal that has been made in the Draft Bill could be improved significantly. First, given my comments above on the scope of grandparenting in the context of IF requirements, I am obviously of the view that the 10% holdback on transfers is a vastly inferior way of dealing with IF requirements than is the proposal that **all licences** be subject to Crown IF licences.

Second, I must admit to a concern that to confer a right to transfer an allocation upon an existing licensee may confer a windfall benefit upon those licensees, especially those that are not currently using their entire allocation. These parties have an immediate surplus to transfer without their having to change their practices and become more efficient users of the resource. The response may be that this is simply the price that has to be paid for introducing an incentive to conserve. I am reluctant to accept that conclusion without considering further options. For example, would it be possible to review all existing licences to determine the extent to which beneficial use is being made of the authorized diversion volumes and then adjust the licences accordingly? In the alternative, would it be possible to limit the quantities that could be transferred to those volumes that the applicant could show had been "saved" as a result of its conservation practices? I confess that this second option would probably be unworkable. Furthermore, neither deals with the situation in which the transfer is proposed in order to transfer the right from some marginal land to another user who can make more efficient use of the right, perhaps allowing the transferor's property to revert to a grazing use.

No doubt the best response to this concern about private windfalls from public resources is the frank acknowledgement that the problem is already with us. There is already a significant difference between the market value of irrigated and non-irrigated land which suggests that licensees have, for some long time, been capturing economic rents from the resource. All that will change with the introduction of a transfer system is that the capture of rents and the allocation of values as between the water right and the land will become more obvious. But, to be more positive, the system should become more convenient and efficient. In short, while I am troubled by this aspect of the transfer mechanism, I do not believe that these objections are persuasive.

Third, the scheme (as with many other provisions of the Draft Bill) reserves far too much discretion to the responsible official. It boggles the mind that the Director could authorize a transfer of a senior licence from a downstream location to an upstream location without being required to consider the effect of the transfer on other licensees and the effect of the transfer on "the aquatic or riparian environment". Similarly, it seems perverse that where the Director has established that there is an unmet IF requirement she should have a discretion (rather than being required) to withhold up to 10% of the amount, and **may** issue an IF licence to the Crown. In each case these should be mandatory requirements. Finally, it should be noted that the resulting IF licence (if issued) will not have priority over any licence other than a licence issued after the Act comes into force.[26] Again this is perverse. Should not the IF licence at least have the same temporal priority as the licence out of which the holdback has been carved?

The Road Not Taken: Selected Issues not Dealt With by the Draft Bill

Water Pricing and Metering

Under the WRA, users do not pay a commodity price for the water that they use. Instead, the licensee, be that an individual user, a municipality, or an irrigation district, pays a small fee for the licence. The ultimate users of the water (e.g. the household user in the municipality or the irrigation farmer) pay additional charges for the actual utility service received, but these charges are calculated not by reference to the commodity value of the product, but solely by reference to the cost of service principles of public utility regulation.[27]

The *Guide* that accompanied the Draft Bill noted that the matter of charges for the use of water was a contentious issue but that many Albertans[28] "supported the philosophy of user pay and broader use of water pricing ... 'W]hen you have to pay, conservation .nd proper use will follow." This reasoning seems sound, and consistent with the modern trend to use economic instruments, where appropriate, to achieve conservation goals in a cost effective manner. However, the Draft Bill does not mandate the use of commodity pricing. Instead, in one of the most generally worded clauses of the Act (s.7), the Minister is authorized to use *inter alia*, incentives, subsidies, fees, levies and charges, in order to achieve conservation and management objectives.

The Act provides even less guidance on the issue of water metering. Under the present WRA regime, the province takes the view that water metering is a matter for individual municipalities. Consequently, some cities and municipalities such as Edmonton[29] require metering whereas others, ;uch as the City of Calgary, do not. Furthermore, attempts by informed citizens to require the adoption of metering through the referendum process have failed on a number of occasions in Calgary. In my view, the inability or unwillingness of some municipalities to deal with this issue is reason enough for dealing with the issue more explicitly in the Draft Bill. Instead, the Draft Bill fails to require the province to take a leadership role when a municipality refuses or is unable to act. Water metering may well be a situation in which at least some of the costs[30] of failing to adopt the scheme are felt by downstream users. To the extent that that is the case, it is just as inappropriate for the provincial government to abdicate its responsibility for these spillover effects as it is inappropriate for the federal government to abdicate responsibility for extra-provincial environmental spillover problems. The Draft Bill should provide more guidance.

Aboriginal Water Rights

Any student of western water law, or of aboriginal law, is aware that the seminal case in the United States on the subject of aboriginal water rights is *Winters v. United States*[31]. That case established the proposition that the Executive was deemed to have reserved sufficient water rights for the irrigable lands of the reservation, even if not expressly mentioned in the executive instrument creating the reservation. The reserved water right was to take precedence over state water law and was to have a priority dating back to the time that the reservation was set apart, even though the waters were not put to beneficial use until later.

The *Winters Case* happens to involve the waters of the Milk River which rise in the United States in Montana, cross into Alberta, and then cross back into the U.S., ultimately reaching the sea in the Gulf of Mexico. The geographical proximity of the site of the *Winters* litigation serves to sharpen the contrast between the position of the tribes in Montana with that of the First Nations of Alberta.

The Draft Bill is completely silent on the subject of the water rights of First Nations in Alberta. Instead, the Draft Bill insists that:

> The property in and the right to the diversion and use of all water in the Province is vested in Her Majesty in right of Alberta.

The Guide to the Discussion Draft carries this position further and notes that it is the Province's position that aboriginal water rights have been extinguished and that the province has the exclusive jurisdiction over water in the province.[32]

Obviously this is not the place to resolve issues as to the extent and validity of the claims of First Nations to water rights.[33] However, I do wish to argue that by ignoring the issue in the Bill, the province is losing an opportunity to invite a settlement of claims according to an equitable set of principles. The experience in the United States suggests that if we fail to settle these issues now, they will surely become more bitter and, in the result, will undermine the security of the very rights that the province is trying to protect and assure.

The issue could have been addressed as part of an expansion of what is stated to be one of the objectives of the legislation, namely a recognition in (s.2(d))"the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management".[34] The Draft Act might have indicated a willingness to enter into agreements with aboriginal governments for the allocation of waters on the basis of the principles of equitable utilization that inform international allocations[35] as well as interjurisdictional allocations in the United States.[36]

The Purposes Clause of the Draft Bill

I cannot close this note without a comment on the purposes clause of the statute. Let me say at the outset that I favour the use of purposes clauses in statutes, especially environmental statutes. I also think that purposes clauses should sing; that is, they should not be written in the same dreary and convoluted prose as the rest of the statute.

I favour the use of a purposes clause because such a clause provides the Legislature with an opportunity to stake out and make explicit the ethical underpinnings of the statute, and an opportunity to answer the question "what principles ought to govern our allocation of water in this province for the next century". Where do we stand?[37] Do we favour a short-run utilitarian approach to the environment in which the environment is seen to have value only insofar as it meets our direct needs? Or, do we believe that a long-run approach is appropriate in recognition of the fundamental truth that the survival of our species depends upon our success in maintaining biologically diverse and resilient ecosystems? Or do we believe that the environment has inherent worth and that aquatic and riparian ecosystems deserve protection, or at least moral consideration, simply because they are?

Well, don't expect any answers, or even guidance, from the purposes clause of this Draft Bill. Just about everything but the kitchen sink (oh, except of course, ecology, ecosystem etc) finds an honourable mention in this statement of statutory purpose, and all in the same technocratic language. How about this for an example. The Act apparently should recognize:

> (e)the important role of comprehensive and responsive action in administering the Act.

This is not a Charter for the civil service. In my view it ought to be a Water Charter for Alberta for the twenty first century. In order to become that it needs some poetry, it needs to sing.[38]

While not poetry, I will leave the last word to the authors of the study of the challenges facing western water policy in the United States:[39]

> Ecology requires that watercourses, as living ecosystems, be given specific and meaningful protection. The principles of conservation and ecology merge into the overarching idea of sustainability: water policies should include hard-edged guarantees so that water use will allow both living watersheds and economies to be sustainable indefinitely for the good of future members of the community.

In my view, the Draft Bill as currently framed does not provide for necessary framework for ecological and social sustainability.

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Notes

1.The reference to the "lords of yesterday" is from Wilkinson, "Towards an Ethic of Place" in *The Eagle Bird: Searching for an Ethic of Place*, 1992, preliminary edition, at 106. What Wilkinson intends to capture by this phrase are those legal doctrines that have supported the development ethic on which the west was built. These doctrines include the prior appropriation doctrine of western water law and the free miner right tradition that pervades mining statutes. Other similar regulatory or quasi-regulatory schemes embodying a developmental ethic rather than a ecological ethic would include postage stamp, and rolled-in tolls rather than incremental tolling principles.

2. R.S.A. 1980, c. W-5 and see *Water Management in Alberta: Challenges for the Future*, Alberta Environment, 1991. Alberta Environment also made available a series of 12 background papers in order to stimulate informed debate.

3. In addition to the Draft Bill, Alberta Environment also made available a *Guide to the Discussion Draft*, Alberta, Environmental Protection, 1994.

4. Sarah F. Bates *et al*, *Searching Out the Headwaters: Change and Rediscovery in Western Water Policy*, Island Press, Washington D.C., 1993, at 181.

5. S.C. 1894, c. 30. See Percy, "Water Rights in Alberta" (1977), 15 Alta. L. Rev. 142.

6. The same trend is evident in the United States and is well captured in Stegner's writings e.g. "Living Dry" in Wallace Stegner, *Where the Bluebird Sings to the Lemonade Springs*, 1992 at 57 -75.

7. S.A. 1962. c.30.

8. *Schneider v. Town of Olds* (1970), 8 D.L.R. (3d) 680 (T.D.), and Percy, *The Regulation of Ground Water in Alberta*, Edmonton, Environmental Law Centre, 1987.

9. The Bill would abolish the legislated priority list of uses contained within s.11(1)(a) of the WRA. However, that priority, while no doubt of tremendous political significance, was very much a second order of priority to the priority based upon time.

10. The Draft Bill uses the term "instream need" and defines it, in part, as the amount and quality of water necessary to protect a water body or an aquatic or riparian ecosystem. The Act also contemplates licences to meet water conservation and management objectives. For purposes of simplicity I shall refer only to IF licences.

11. The term "activity" is defined in very broad terms in the Draft Bill. An approval may authorize a diversion but it gives no priority to use water (s.37(4)).

12. The Draft Bill also creates something called a "preliminary certificate". This certificate serves to allow the construction of works for the diversion of water. It does not itself seem to allow the diversion of water.

13. It is not clear whether the transfer approval mechanism applies both for a change of use (i.e. existing licences have been issued for a specific use) and a change of appurtenancy or only the latter. Given that some uses are more consumptive than others, the transfer mechanism should apply to both.

14. WRA, s.23(2); the purposes are specified in s.11.

15. For discussion of this issue see McConnell, "The Draft Alberta Water Conservation and Management Act: Implications for International Trade Law" (1994), 9(4) Environmental Law Centre: News Brief 4. My only contribution to this debate is to ask whether it makes good policy sense for the Government of Alberta to telegraph its intentions in such a constitutionally suspect manner? Is it not possible to deal with the problem of extra-provincial transfers through more general criteria that require the Director to consider factors such as the sustainability of communities and interests (human and non-human) dependent upon the water that is proposed for transfer? This approach has the advantage that attention is focused on what I perceive to be the real issues of ecological and social sustainability rather than nationalism. The approach may also be more constitutionally viable. It would presumably also be more difficult to prove a GATT breach (the concern of McConnell's contribution) if there was no facial discrimination on the basis of the location of the end-user.

16. The drafting would be improved (purely from a technical perspective, the substantive issues are dealt with below) if the section read: "was entitled to the right to divert by virtue" etc.

17. The Draft Bill defines this Act by reference to the Act as found in R.S.C. 1927, c.104. I assume that the intent here is to incorporate licences issued under predecessor versions of that Act. Has the draftsperson succeeded? If my assumption is incorrect why is the cut-off for grandparenting, 1927?

18. Ferner, "The Draft Water Conservation and Management Act: Instream Flow Protection and Restoration" (1994), 9(4) Environmental Law Centre, News Brief 5. For more discussion of the IF issue in an Alberta context see Ferner, *Instream Flow Protection and Alberta's Water Resources Act: Legal Constraints and Considerations for Reform*, Calgary, Canadian Institute of Resources Law, 1992. Ferner provides a practical example of a waterbody experiencing IF problems in his discussion of the Highwood River.

19. Draft Bill, s.52. The Bill actually suggests that licences may be issued either for IF requirements or in order to implement a water conservation and management objective.

20. i.e. a situation in which if all licensees diverted their authorized quantities, there would be insufficient water remaining to meet the fundamental ecological requirements of the waterbody.

21. The literature on the public trust doctrine and its application to western water law is massive. For examples see the collection of papers for the *Symposium on the Public Trust and the Waters of the American West: Yesterday, Today and Tomorrow*, published in (1989), 19(3) Environmental Law. The classic case is *National Audubon Society et al v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983), the *Mono Lake Case*. The City of Los Angeles owned the water rights to streams flowing into the land-locked Mono Lake. The City constructed works to appropriate these waters and commenced the diversion. The result was serious damage to the ecology of the lake and the plaintiffs commenced suit to restrain the diversion. On a preliminary motion the Supreme Court of California held that the state water rights system was subject to the public trust doctrine and that state authorities should consider the effect of diversions upon values protected by the public trust and attempt, so far as possible, to avoid or minimize harm to those values. Finally, the decision confirmed that ecological values fell within the protection of the public trust.

22. Framed this way, I do not believe that we need be too concerned as to whether the licences in question were issued before or after 1930 (the problem of the Natural Resources Transfer Agreement, an issue that I cannot discuss further here, see Harrison, "The Legal Character of Petroleum Licences" (1980), 58 Can. Bar. Rev. 483 for further detail). I acknowledge that the public trust doctrine lacks a secure footing in Canadian law (for a pessimistic analysis see Hunt, "The Public Trust Doctrine in Canada" in John Swaigen (ed), *Environmental Rights in Canada*, 1981 at 151-194) but its application has not been expressly rejected by a Canadian appellate court. Furthermore, this is clearly an area in which the legislature might give some guidance to the courts, perhaps through a reference to public trust values in the purposes clause of the legislation. The Bill as presently drafted does the reverse, for it would make it even harder to argue that existing licences should be subject to ecological and amenity values. Presumably, the federal government can compel a provincial licensee to meet IF requirements for fish and fish habitat pursuant to the federal fisheries power: *A.G. Canada v. Aluminium Co. of Canada Ltd.* (1980), 115 D.L.R. 495 (B.C.S.C.), on the motion to grant intervener status to certain groups see (1987), 35 D.L.R. (4th) 495 (B.C.C.A.); for the time being the litigation has been compromised by agreement.

23. The discussion of the "principle of equity" in *Searching Out the Headwaters*, *supra*, note 4 suggests that we should be asking whether this decision (which may be vital to community survival) is best made by an Edmonton-based official or whether the decision-making should be decentralized.

24. This is not free of difficulty. Over the years, seepages from irrigation ditches have allowed for the development of important wildfowl habitat. It should also be noted that transfers may intensify IF problems insofar as an unused portion of an allocation may become subject to intensive use upon the transfer. Presumably, this is one of the matters that will be looked at by the Director as part of her consideration of an application to transfer.

25. The technique is not new. Another well-known example is provided by the special renewal permits issued under the Canada Oil and Gas Regulations, SOR/61-253 as am. If a permittee elected to opt for the special renewal it did so subject to the right of Petro-Canada to "back-in" to its interest. For discussion see Harrison, *supra*, note 22 at 514 *et seq.* If there are concerns about this line of reasoning it might be appropriate to confirm in the Draft Bill that neither the licensee nor the transferee shall be entitled to compensation in the event of a holdback.

26. I rest this conclusion on the following

line of reasoning. A holdback licence authorized under s.84(2) is issued under s.52(2). The priority of s.52(2) licences is dealt with by s.28(5) of the Bill and indicates that an IF licence will only have priority over licences issued under this Act. By contrast, the Draft Bill states that where a licence allocation is divided after a transfer, all the resulting licences shall have the priority of the original licence (s.82(6)). While an argument may be made on the language of the Bill that this same priority should be accorded to the holdback IF licence, I do not believe this to be persuasive. In any event, the point should be clarified if this scheme is retained.

27. Of course, in some cases, not all of these costs will be recovered from irrigators but are borne instead by the general tax payers who have footed all or part of the bill for construction of the irrigation project.

28. *The Guide, supra*, note 3, at 37.

29. See Brooks *et al*, "Pricing: A Neglected Tool for Managing Water Demand" (1990), 17(3) Alternatives 40.

30. I acknowledge that this is not entirely the case insofar as the failure to meter requires municipalities to "over-engineer" the water utility, thereby increasing capital expenditures which enter into the rate base calculations. However, to the extent that those costs are sunk costs they will not enter into calculations of self-interest in determining whether or not an individual should vote pro or con on the metering question in the next municipal plebiscite.

31. 207 U.S. 564 (1908).

32. *The Guide, supra*, note 3, at 29.

33. For extensive discussion see Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal title to Water and Indian Water Rights*, Calgary, Canadian Institute of Resources Law, 1988.

34. The draft notes that governments of other jurisdictions includes other provinces, territories, the Government of Canada and other governments (such as the U.S.). There is no specific mention of aboriginal governments.

35. See the Helsinki Rules of the International Law Association, *Report of the Fifty-Second Conference of the International Law Commission*, Helsinki at pp.484-533 and the Draft Articles (Second Reading) of the International Law Commission on the Law of the Non-Navigational Uses of International Watercourses, U.N. Doc. A/CN.4/L.493, 8 July 1994.

36. Section 11 of the Draft Bill does envisage the use of interjurisdictional agreements but it does not identify the principles that should inform such agreements; neither does it embrace aboriginal governments within its ambit.

37. Anne Bell, "Non-Human Nature and the Ecosystem Approach" (1994), 20(3) Alternatives 20.

38. The best examples of purposes clauses that sing are undoubtedly found in U.S. legislation. See for example the U.S. Wilderness Act, 16 U.S.C. 1131 and the Endangered Species Act, 16 U.S.C. 1531. For some examples closer to home see s.3 of the *Wilmore Wilderness Park Act*, R.S.A. 1980, c. W-10 and the Preamble to the Constitution of Montana which reads as follows:

> We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution. (Montana Code annotated, volume 1, 1991)

My attention was drawn to this text by Kemmis, *Community and the Politics of Place*, Norman, University of Oklahoma Press, 1990.

39. *Supra*, note 4, at 196.

Institute News

• Janet Keeping taught for the Faculty of Law at Tyumen State University in Tyumen, western Siberia for the month of November 1994. Her lectures addressed Canadian government and Canadian constitutional law, the latter especially as it relates to the development of natural resources. As a result of that experience, the Canadian Institute of Resources Law has signed an agreement to cooperate with Tyumen State University on the further development of legal education and research at that university and the several new colleges of law that recently commenced operation in the Tyumen region.

CIRL's other Russian-focused work has taken different forms. CIRL is a part of Canada's Government-to-Government Initiative which is led by Natural Resources Canada. CIRL's work there has included the provision of advice on new Russian natural resources legislation and the organization of seminars on issues related to oil and gas regulation. Also, over the next few years, CIRL will be conducting a joint Canada-Russia research project concerning coal mining in Russia which is funded by the Gorbachev Foundation.

1994 Essay Prize Awarded

The Institute recently awarded its $1,000 essay prize to Ms. Shelley Kaufman for her paper entitled "Setting the Constitutional Framework for Environmental Protection". Ms. Kaufman is presently completing her fourth and final year in the joint Law/Master in Environmental Studies program at York University and Osgoode Hall Law School. In the summer of 1995 she will be articling with the Toronto law firm of Blake, Cassels and Graydon.

Ms. Kaufman's paper was one of several essays submitted to a Selection Committee composed of Ian Routhwaite, a Professor in the Faculty of Law at The University of Calgary, Douglas Rae, a lawyer with the firm Rae & Company, and Edith Gillespie, a lawyer with the firm of Code Hunter Wittman.

Recent Developments in Canadian Mining and Oil and Gas Law

*y Susan Blackman**

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MINING

Royalties and Exploration Licences – Whether Interests in Land – Nova Scotia

The Nova Scotia Court of Appeal has upheld the decision of the Trial Judge with different reasons in *Nova Scotia Business Capital Corp.* v. *Coxheath Gold Holding Ltd.* In 1990, the appellants obtained royalty interests derived from exploration licences granted to F under the Nova Scotia *Mineral Resources Act* (S.N.S. 1975, c.12). The royalty interests were created in agreements between F and CGH in 1986 and 1988. F did not egister his royalty interests; indeed, ne Nova Scotia government did not recognize fractional interests in exploration licences at that time. In 1991, the appellants filed caveats purporting to protect their interests. CGH defaulted on a loan granted by NS BCC and went into receivership. NS BCC sought a court order determining the priority of the royalty interests. If the royalty interests could be construed as contractual only, then the licences could be transferred by the receiver free of the royalties.

The Court examined the statutory nature of the exploration licence and concluded it did not grant to its holder any interest in land. This conclusion was based in part on the construction of the statutory description of the interests the licensee received and in part on the fact that a licensee is prohibited from transferring its licence ithout first obtaining the consent of ne Minister. Since the licence was not an interest in land, the licensee could not carve out of its licence any royalty interest that was an interest in land. The appellants interests were contractual only. See *Nova Scotia Business Capital Corp.* v. *Coxheath Gold Holding Ltd.*, [1994] N.S.J. No. 480 (Q.L.) (C.A.).

Miners' Liens – What Can be Encumbered by Lien – Yukon Territory

C owned five adjacent mining claims and leases, two of which were being mined. The other three were either exploratory only or otherwise had no minerals extracted from them at the time of the trial, so it could be argued that they were not mines. When C filed for bankruptcy, people who had done work on the properties filed miners' liens against all five properties to protect their claims for payment, and then commenced proceedings pursuant to the Yukon *Miners' Lien Act* (R.S.Y. 1986, c.116). The issues were: 1) whether the liens could attach to all five properties even though only two were being worked, and 2) whether the lienholders were entitled to interest.

Section 2 of the Act states:

(1) Any person who performs any work or service in respect of or places or furnishes any material to be used in the mining or working of any placer or quartz mine or mining claim shall, by virtue thereof, have a lien for the price of such work, service or material upon the minerals or ore produced from and the estate or interest of the owner in the mine or mining claim in or in respect of which such work or service is performed or material furnished, limited however in the amount to the sum justly due to the person entitled to the lien.

(2) The lien shall attach upon the estate or interest of the owner and of all persons having any interest in the mine or mining claim and all appurtenances thereto, the minerals or ores produced therefrom, the land occupied thereby or enjoyed therewith and the chattels, equipment and machinery in, upon or used in connection with such mine, mining claim or land.

Hudson, J. decided that the statute should be interpreted liberally on the basis that it is a remedial statute, and that s.2 specifically should be interpreted on an expansive, functional basis. To do otherwise would necessitate tracing all the labour, service or material provided to particular components of the operation. Also, the Judge did not consider it appropriate to use cases from the tax field to restrict the definition of "mine" especially when s.2(2) specified that the lien could attach not only to the mine but also to the land enjoyed therewith, and any machinery used "in connection" with the mine or the land. The evidence disclosed that the properties were contiguous, had common ownership and had been continuously held out to be an integrated operation. The Judge also refused to consider this matter as a contest between lien claimants and other creditors, since neither the statute nor the various authorities on liens contemplate that position. Therefore, the liens attached to all five properties.

A second issue was whether interest was to be included in the "sum justly due to the person entitled to the lien." The Judge held that interest is included in the lien amount and accrues from the date of the filing of the claim. See *Yukon Energy Corp.* v. *Curragh Inc.*, [1994] Y.J. No. 132 (Q.L.) (S.C.).

British Columbia – Appeal from Gold Commissioner's Decision – Whether by Way of Trial de Novo

The British Columbia Court of Appeal has again considered the question of whether an appeal to the Supreme

Court of a decision made by the Chief Gold Commissioner under s.35 of the *Mineral Tenure Act* (S.B.C. 1988, c.5) may proceed by way of trial de novo. A trial de novo would require the appeal court to reconsider all the evidence examined by the Commissioner and make a decision just as if the Commissioner had made no decision at all.

The five-judge Court held unanimously that its earlier decision in *Mackenzie* v. *Mason* (1992), 72 B.C.L.R. (2d) 53, was correct in holding that the appeal cannot be by way of trial de novo. This is both because to allow an appeal by trial de novo would be to deprive the proceedings of the expertise in the these matters afforded by the Chief Gold Commissioner and because the statute does not specify that the appeal is to be by way of trial de novo. The Supreme Court may order how the appeal is to proceed but it may not order that it will proceed by trial de novo. If it is found that the Commissioner has made a reviewable error, the correct procedure is to refer the matter back to the Commissioner for redetermination.

The Court also commented on the powers of the Chief Gold Commissioner in making a s.35 determination about the validity of staking on receiving a complaint. The Court held that s.35 implicitly includes powers for the Commissioner to order the production of documents, transcripts or minutes; to call for the production of evidence; and to hear argument on a point of law. The Court also held that the Commissioner has the powers necessary to exercise his/her discretion in accordance with justice and fairness and the principles of natural justice. This may require the Commissioner to give written reasons for his/her decision.

OIL AND GAS

Operating Agreements – Fiduciary Obligations of Operator – Area of Mutual Interest Clause

The decision of the trial judge in *Luscar* v. *Pembina* (reported in *Resources*, No. 37) has been overturned on appeal. In that case, P., the operator, allegedly had breached the area of mutual interest clause in an operating agreement three times. This deprived the plaintiffs of the opportunity to participate in lucrative land acquisitions. At trial, the plaintiffs succeeded in showing that a breach of the clause was a breach of the operator's fiduciary obligations and they were entitled to take up the interests denied them by P.'s actions. In the decision, the trial judge construed the area of mutual interest clause as creating a fiduciary obligation because it gave the plaintiffs a right to land. He also found that the operator's general fiduciary obligations required the operator to share its geological theories and work products with the non-operators.

The Alberta Court of Appeal rejected the trial judge's characterization of the area of mutual interest clause. Instead, the Court construed the clause as being simply an obligation to give notice. Thus it did not grant the parties to the agreement any interest in land. The Court noted that obligations to give notice have never been held to be fiduciary obligations. Therefore, the area of mutual interest clause was not part of the operator's fiduciary obligations. Furthermore, the Court held that there was no general fiduciary obligation to share information. Information must be shared as specified in the contract, but the contractual obligation cannot be enlarged by the law of fiduciary obligations. The Court came to this conclusion by looking at the practice in the industry, and it held that it has never been the practice for operators to share with others work product such as in-house geological interpretations of raw data.

As stated by Conrad, J.A., the decision leaves intact the law with respect to the fiduciary obligations regarding the joint account and with respect to the administration and operation of the joint lands.

Although not necessary for the decision, the Court did express the opinion that pooling is not the kind of land acquisition that would trigger area of mutual interest clause obligations, notwithstanding that the pooling results in ownership of lands. The right to those new lands was felt to be simply an extension of the pre-existing acquisition that gave rise to the operating agreement.

Finally, unlike the trial judge, the Court of Appeal thought that the plaintiffs did have all the facts necessary at the time of the alleged breaches of the clause to determine whether a cause of action in breach of contract was available. In Alberta, according to earlier decisions of the Court of Appeal, the limitation period for a breach of contract action starts to run when the breach is committed. In the other jurisdictions in Canada, the limitation period starts to run when the breach is discovered. The finding in this case, that the breach was or could have been discovered in time to bring a breach of contract action, means that the breach of contract action is barred not only under Alberta law, but also on the application of the discoverability rule, if the Supreme Court of Canada should decide that the position maintained by the Alberta Court of Appeal on this point is incorrect.

* *Susan Blackman is a Research Associate with the Canadian Institute of Resources Law and is the Canadian oil and gas and mining law reporter for the Rocky Mountain Mineral Law Foundation Newsletter.*

Institute Publications

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Resources
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