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Environmental Security and Gas Exports

*by Nigel Bankes**

Over the last decade, environmental organizations have attempted to raise concerns about the cumulative environmental effects of oil and gas exploration and development in western Canada. These oil and gas activities lead to the opening-up of wilderness areas through the preparation of access roads for seismic and drilling, and to environmental degradation resulting from the construction of pipelines and gas processing plants. Concerns with cumulative effects focus on air and water quality and loss of habitat, including, in some cases, the habitat of threatened or endangered species. The environmental organization most closely associated with this argument is the Rocky Mountain Ecosystem Coalition (RMEC).[1]

There has been no obvious forum in which to have these issues debated and considered in a rational way. This conclusion stands notwithstanding the existence of two energy regulatory agencies, one provincial, the Energy and Utilities Board (formerly the Energy Resources Conservation Board, the "EUB"), and the other federal, the National Energy Board (the "NEB"), as well as a comprehensive federal environmental assessment process (formerly the Environmental Assessment and Review Process, now under the Canadian Environmental Assessment Act[2]). All attempts by RMEC to have these issues dealt with by both the NEB and the EUB have been systematically rebuffed,[3] most recently by the decision of the Alberta Court of Appeal in Rocky Mountain Ecosystem Coalition et al v. Alberta Energy and Utilities Board et al[4] which provides the occasion for the present comment. The comment focuses on the provincial proceedings but it should be recognized that there have been parallel proceedings with similar results before the NEB and the Federal Court.[5]

My comment has two objectives. The first is to provide a critique of the decision of the Alberta Court of Appeal. My argument will be that the court made a decision that was dictated by policy considerations and not by law. Furthermore, in making a policy decision, the court ignored the policy question that was raised by RMEC's application and instead, based its decision on the policy issues brought before it by the gas interests.

My second objective is to propose an appropriate forum and method for considering the issue that is at the heart of RMEC's argument, namely, a mechanism to ensure that the cumulative effects of ongoing gas exploration do not undermine ecosystem health. I propose a mechanism that draws upon methodologies adopted in the past by both boards to ensure security of supply. I propose the adoption of a different objective, long run environmental security, and the adoption of a methodology to measure against that objective the environmental consequences of replacing exported volumes of gas through further exploration and development activities.

Résumé

Les commissions d'énergie fédérale et provinciales et les tribunaux ont systématiquement repoussé toute tentative de la part des organisations environnementales d'exiger des organismes de réglementation qu'ils évaluent les effets cumulatifs des activités d'exploration de gaz sur l'environnement. L'auteur suggère que les organismes de réglementation, plutôt que de faire une analyse rétrospective des activités d'exploration lors d'une demande d'autorisation d'exportation, devraient procéder à des examens génériques de l'effet qu'exercerait le remplacement de ces volumes de gaz (par de nouvelles explorations) sur la santé des écosystèmes. Ceci permettrait à ces organismes de se concentrer sur les effets cumulatifs des futures activités d'exploration de gaz sur la sécurité à long terme de l'environnement.

It is no coincidence that, hitherto, efforts to find a forum for discussing these issues have focused upon gas export (ex-Canada[6]) or removal (ex-Alberta[7]) decisions. This is not an indication that RMEC is not concerned with the effects of the provincial consumption of gas, but flows from the recognition of two realities. First, over 50% of domestic production is exported to the United States and about 80% of Alberta's production is removed from the province; further reserves need to be generated to meet this demand, a demand that is projected to grow not diminish. Second, RMEC's concern is with cumulative effects. It is not a concern with particular wells, seismic lines or access roads. Export volumes, by their nature, represent an aggregation from exploration activities throughout the western sedimentary basin.

There are also serious problems with focusing on the export decision. Part of the problem relates to the retrospective nature of the inquiry. That is, rather than looking to the future and asking what will be the environmental costs associated with replacing volumes of gas that are to be exported, the regulators have been asked to assess what are the impacts of exporting particular volumes of gas. The regulators have all sorts of reasons for declining to answer this type of question. Here are five common reasons. First, the decision to export gas is environmentally neutral if the Board is allowed to focus on the export decision in isolation from upstream and downstream activities. Second, even if a regulator takes, or is required to take,[8] a more contextualized approach, it is impossible to draw a direct connection between particular export volumes and environmental damage in a particular area, especially if the exporter indicates that the volumes will be taken from its corporate supply pool. Third, since the volumes required to support an export application have already been proven, the associated environmental damage, if any, has already been incurred. Fourth, since all exploration activities required to prove up these volumes have been conducted in accordance with prevailing rules and regulations, it would be unfair to change the rules of the game at the time of export. Finally, a review at this time would be duplicative of the existing scheme of regulations.

These arguments are precisely those that the EUB accepted in *RMEC v. AEUB.*

RMEC v. AEUB

In 1994, CanStates and ATCOR applied to the EUB for permits under the *Gas Resources Preservation Act (GRPA)* authorizing the removal of gas from the province over a 15 year period. The applicants presented no material on the environmental implications of their proposal. In a portion of the application headed "Public Interest Matters" the applicants' comments, in their entirety, were as follows:[9]

> The proposed removal of gas ... is in the public interest and involves substantial expected economic benefits to Alberta. For example, the proposed permit would:
>
> (a) involve a sale of Alberta gas to a truly incremental export market;
>
> (b) provide the procurers of gas with a market which is responsive to the producers' pricing expectations, with no material risks as to downstream transportation costs; and
>
> (c) generate substantial revenue for the producers over the term of the Removal Permit, to enable exploration for and development of new reserves.

RMEC objected to the applications on the basis of a 1992 amendment to the *Energy Resources Conservation Act*[10] *(ERCA)* which added a comprehensive definition of the term "environment" as well as the following substantive section:

> 2.1 Where by any other enactment the Board is charged with the conduct of a hearing, inquiry or other investigation in respect of a proposed energy resource project, it shall, in addition to any other matters it may or must consider in conducting the hearing, inquiry or other investigation, give consideration to whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment.

At a pre-hearing meeting, the applicants argued that s. 2.1 of the *ERCA*[11] "had no material effect upon the jurisdiction of the Board when assessing applications for removal permits" under the *GRPA.* They adduced three main arguments. First, a gas removal permit application was not "a proposed energy resource project". Second, even if it were, any attempt to apply the section to gas removal permits would duplicate existing reviews of upstream effects. Third, the Board could deal with RMEC's concerns simply by taking note of[12] "the broad suite of legislation, regulations and guidelines which comprise the regulatory regime for oil and gas in Alberta." The Board accepted the substance of most of these arguments and ruled that the applications were complete. The two companies were not required to adduce further material on the public interest or on upstream environmental matters.

Leave to appeal to the Court of Appeal was granted on two grounds:

> 1. Has the amendment of the *ERCA* any impact on the general policies and procedures of the Board in fulfilling its functions in relation to applications for gas removal permits under the *GRPA*?
>
> 2. Regardless of whether the amendments have any impact on the general policies and procedures of the Board, has the Board, in deciding the CanStates and Atcor applications complied with its statutory mandate arising from the amendments?

The narrow legal issue for the court might well have been: is an application for a gas removal permit "a proposed energy resource project" for the purposes of the *ERCA*? That was not an issue that had been dealt with by the EUB in its decision and the Court declined to answer the question.

This narrow technical issue put to one side, the Court went on to provide a resounding endorsement of the Board's approach. Given the Board's continuum of responsibilities for the different aspects of the gas industry, "*it was not reasonable*" to engage in a further reconsideration of the environmental and socio-economic effects of the export applications. The court went on to say that the amendments had had no "impact upon the Board's existing policies and procedures regarding

export permits" because it was *"inappropriate"* to consider these issues anew at the export permit stage. Then comes the remarkable statement that "It is thus not necessary and we do not decide that the amendments require the Board to expand or alter its existing policies and approval procedures to comply with the amendments." I have three criticisms of the decision.

First, the Court asked itself the wrong question: "is it reasonable (or is it appropriate) for the Board to conduct an environmental and socio-economic review at the stage of an application for an export permit?" The type of question that a reviewing court should have asked is somewhat different: "is it lawful for the Board to refuse to conduct an environmental and socio-economic review at the time of an application for an export permit in light of the amendment to the *Act*?" The court allowed the Board to say that the Board could decide which of its procedures it needed to change to comply with the Act, whereas the *Act* applies to *"any* other enactment".

Second, the Court ignored one of the standard rules of statutory interpretation to the effect that a statutory amendment is deemed to be remedial.[13] We should not readily reach the conclusion that the Legislature intended that the Board could simply declare "business as usual".

Third, the Court refused to answer the very question that was put to it. Badly drafted as the issues on appeal might be, how could one possibly reach the conclusion that the Court was not being asked to rule on whether "the Board is required to expand or alter its existing policies and approval procedures to comply with the amendments"?

These criticisms justify the claim made in the introduction that this was a policy decision and not a decision mandated by existing law. But what was the policy position that the court vindicated? It was certainly not RMEC's concern to bring about a review of the effects of ongoing gas activities on ecosystem health. Instead, the court's policy concerns were those of efficiency, avoidance of duplication, and fairness of decision-making. These concerns are all valid but they are weighted in favour of the private interests of the applicants and not in favour of the public interest concerns that are articulated in the amendment.

The Need for Change

The attempts of RMEC to use export and removal applications as the forum for raising these issues of cumulative effects and ecosystem health have caused immense frustration on all sides. The boards and applicants are frustrated by seemingly endless days of public hearings, and the environmental interveners are frustrated by boards that persistently decline to deal with what they consider to be the real issues. What can we learn from this? The existing regulators have been extremely reluctant to assume a broader responsibility for assessing the environmental consequences of the industries under their jurisdiction. The courts have allowed them to abdicate that responsibility, but they have not yet answered this question: *could* the boards use the export approval process to engage in a systematic assessment of the environmental implications of the gas industry?

Is there an alternative? If the regulators could be persuaded to carve out a role for themselves, what would we have them do? In this final section of the comment, I suggest one alternative. This suggestion needs to be prefaced with a consideration of the following question: what is the purpose, or what ought to be the purpose, of the environmental regulation of the gas industry? There are many possible answers to this question but, at a macro level, the response might be that environmental regulation is, or should be, designed to ensure the maintenance of ecosystem health. More specifically, environmental regulation should ensure the maintenance of an ecosystem in which, over time, (a) the food webs are fully functional; (b) key species are preserved as key species; and, (c) genetic, species and population diversity are maintained.[14]

Does the existing spectrum of regulation achieve that goal? Most environmental regulation of the gas industry is designed with much more limited objectives in mind, such as the adequate reclamation of a well site or emission requirements for a processing plant. There is an implicit or explicit assumption that if one adds together the full spectrum of specific regulation, the end result will be healthy ecosystems. Yet, if this is the result, that would be quite fortuitous. We have not explicitly measured existing regulations against this goal of maintaining ecosystem health. Neither have we put in place in this province a network of protected areas and a legislative framework for protected species.[15]

An Environmental Security Test

Not that long ago, both the EUB and the NEB took the view that the interests of Canadian consumers could not be adequately protected by the market. Both boards put in place complex schemes designed to guarantee that exports or removals should only be permitted if there was a domestic surplus. Over the years, the two boards developed a variety of tests guaranteeing a surplus for a fixed period, supplemented by appropriate deliverability tests.

This process was designed to ensure long term security of supply for Canadians and to protect the interests of future generations of customers. It was premised on an assumption of market failure. The regulators have now resiled from that claim and have concluded, with some limited exceptions, that long term security of supply can be provided by negotiating long term gas supply arrangements. What I suggest here is the adaptation of the methodology of the old mandated surplus tests to achieve long run environmental security rather than simple security of supply.

Our long term security, both globally and regionally, depends upon our ability to maintain functioning, healthy and resilient ecosystems. If we fail to do that, we know that future generations will pay the price. We also know that neither an unregulated market, nor a state controlled system, will ensure that we achieve long term environmental security. We need a mix of regulation and market-based procedures.

The details of the scheme need to be fleshed out, but, in broad outline, I envisage a process that would involve generic hearings[16] or assessments on a rolling five year basis. The goal would be to determine the implications for ecosystem health of replacing the gas reserves that have been consumed (or removed) over the preceding five years. The scheme would be forward-looking and would not attempt to assess the damage that had been incurred by past exploration or by the present generation of gas export applications. This

orientation is consistent with both the planning purpose of the impact assessment process as well as the supply-demand methodologies used by both boards.

Multiple analyses would need to be conducted for different regions or ecosystems. The primary burden of the assessment would be borne by the pipeline companies,[17] which would then be able to recover their costs of participating in the process through tolls. The methodology I propose might be developed as part of the export (ex-Canada) or removal (ex-Alberta) process, in which case the two boards probably have the jurisdiction now to implement the scheme as part of their consideration of the overall public interest in approving exports.[18] Alternatively, we might develop a scheme that did not differentiate between exploration designed to meet an ex-Alberta market and exploration designed to replace reserves consumed by the Alberta market.

Governments would be required to play an important part in the process because of the implications of policies for the disposition of Crown resources, as well as policies for endangered species and protected areas. Obviously, much work would have to be done to develop a set of indicators of ecosystem health that could be adapted to the process. We could begin by identifying and monitoring those species most sensitive to oil and gas exploration and development activities, as well as those species hypothesised to play "keystone" or "umbrella" roles in their ecosystems."[19] We would also need to think about how we would use the results of these assessments. Should they be used by the Province to affect its disposition decisions, or to assist it in implementing a protected areas strategy? If the Province failed to implement such a strategy, would that be a ground for the EUB (following the Whaleback decision[20]) to refuse to grant a well licence? Should the results be used to require mitigation measures that might then be charged through to consumers as part of a method of internalizing environmental costs?

In conclusion, I do not pretend that this idea would be easy to implement or that it would be popular with the regulators,[21] the gas industry[22] or even the environmental lobby. What I do claim is that a process such as that briefly outlined in the preceding paragraphs speaks much more directly to the public policy objective of long run ecosystem health than does either the present scheme of incremental regulation, or the demands for the assessment of the upstream effects of oil and gas exploration on the occasion of an application for export approval. The present system is broke; we do need to fix it. The current approach of ignoring the problem is not a real solution.

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Notes

1. I use "RMEC" in this comment as a shorthand for a more compendious reference to other environmental organizations that share these views.

2. EARP (SOR/84-467); replaced by the *Canadian Environmental Assessment Act*, SC 1992, c.37. For detail on the treatment of gas exports under the old rules see Rowbotham and Bankes "The Oil and Gas Industry: some current problems in environmental law" in Thompson et al, *Environmental Law and Business in Canada*, 1993, 543-569 esp. at 553-556. Under the new Act the gas export licensing decisions of the NEB are not included in the so-called "law list" of federal permitting authorities, the exercise of which triggers a *CEAA* assessment: SOR/94-636.

3. For the NEB see in particular the Board's decisions in GH-5-93, GH-5-93 Review, esp. at 23-24 and 29, and GH-3-94 esp. at 12-13. RMEC's applications for leave to appeal the NEB's decisions in GH-3-94 and GH-5-93 (and Review) were dismissed without reasons.

4. Unreported decision of the Alberta Court of Appeal, December 15, 1995.

5. See the references in note 3, *supra*.

6. *National Energy Board Act*, RSC 1985, c.F-14, ss. 116-118.

7. *Gas Resources Preservation Act*, RSA 1980, c.G-3.1 (*GRPA*).

8. *Grand Council of the Crees of Quebec et al v. Attorney General of Canada* (1991), 83 DLR (4th) 146 (FCA), rev'd (1994), 112 DLR (4th) 129 (SCC). The Supreme Court's decision did cause the NEB to review its GH-5-93 Decision, but with no appreciable effect because of the Board's development of the direct connection test.

9. Part IX of the CanStates amended application, para. 21; para. 12 of the ATCOR application.

10. RSA 1980, c. E-11, as am. by SA 1992, c.E-13.3.

11. EUB, CanStates Gas Marketing, Atcor Ltd., Prehearing Meeting, EUB Memorandum of Decision, April 5, 1995, at 2.

12. Id.

13. *Interpretation Act*, RSA 1980, c.I-7, s.10.

14. Brief of the Canadian Arctic Resources Committee and the Canadian Nature Federation on Bill C-98 (The Canada Oceans Act); presented to the Standing Committee on Fisheries and Oceans, October 24, 1995 at 14 and 41. The definition of ecosystem health proposed in that context had an additional element namely that (d) commercial species are maintained at, and where necessary, restored to ecologically sustainable levels. That additional element was proposed in the context of non-introduced, commercial fish species. Although it is perhaps hard to think of a terrestrial example, what are the implications of considering buffalo in this context?

15. Endangered species (ES) legislation that protects critical habitat (as in the US) may help serve the overall objective of ecosystem health provided that listed species include species that are keystone species whose protection serves as an indicator of ecosystem health. But ES legislation cannot do the whole job precisely because it focuses on the specific species rather than the system and because is designed to remediate a crisis situation: the species in danger of extinction. The completion of a network of protected areas is therefore a necessary additional technique.

16. Hearings may well not be appropriate; what we need to ensure is that the process provides for transparency and accountability. A hearing is one way to achieve these goals; there may be others.

17. I pick the pipeline companies as way of fairly apportioning the costs of, and responsibility for, this exercise. If

the review were to proceed at the provincial level it would follow that NOVA would carry the burden of the 'eview; at the federal level, the burden would be more diffuse given the several federally regulated companies involved in the interprovincial and international carriage of gas. Statutory amendments may be required to achieve this result. Precedents may be provided by the mechanisms devised to share take-or-pay obligations: *Take-or-Pay Costs Sharing Act*, RSA 1980, c.T-01.

18. *GRPA*, s.8; *NEB Act*, s.118.

19. Reed Noss, *Maintaining Ecological Integrity in Representative Reserve Networks*, World Wildlife Fund, 1995, at 12.

20. ERCB Decision D 94-8.

21. As stated above, my reading of both the EUB and the NEB is that neither tribunal wishes to take the initiative with some of these difficult policy and environmental questions. Other industry regulators have taken a much more proactive stance. A case in point is provided by the British Columbia Utilities Commission and its implementation of an Integrated Resource Plan policy for the utilities that it regulates; the BCUC may have been a little too proactive, see the recent decision of the British Columbia Court of Appeal: *British Columbia Hydro and Power Authority v. British Columbia Utilities Commission*, unreported decision, February 23, 1996 striking down the mandatory application of the IRP to BC Hydro.

22. I take some comfort from a comment made as part of one of the applicant's objections to RMEC's intervention in the CanStates matter. Mr. Carscallen wrote (at 4) that his client's application should not be used as a forum for debating "(s)uch vague, esoteric and broad issues" with the inevitable delay that would ensue. Instead, "(i)f the ERCB is inclined to the view that .... the socio-economic costs and benefits, the "environmental costs and benefits" .... are matters of current and relevant public interest, then it seems to us that the ERCB might consider the calling of a generic hearing to deal with those matters in relation to all Alberta removal permits generally."

Recent Developments in Canadian Oil and Gas Law and Mining Law

*by Susan Blackman**

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CANADA — OIL AND GAS

Offshore Oil and Gas — Declaration of Significant Discovery — Procedure and Appeals

The plaintiff had drilled and tested a well offshore Newfoundland. On the basis of its results, it applied to the Canada-Newfoundland Offshore Petroleum Board for a declaration of significant discovery. The Board proposed to reject the application and the plaintiff requested the matter be remitted to the Oil and Gas Committee for hearing. After obtaining the Committee's recommendation, the Board rejected the application. The reasons for rejection for both the Board and the Committee turned on the definition of a "significant discovery." The plaintiff argued against the Committee's interpretation on the appeal. Also, the plaintiff argued that the Board needed to give more reasons for its decision than it gave. The Board had issued a decision that, according to the judge, contained only conclusions and then attached the Committee's report. The definition of "significant discovery" requires that hydrocarbon existence be demonstrated by flow testing and that the well and tests "suggest the existence of an accumulation of hydrocarbons that has potential for sustained production."

The judge examined the Committee report and the Board decision and decided that neither was clear on the standard of proof required of the applicant. The Board did not expressly weight the evidence in regard to the proper standard of proof, but merely presented conclusions. Therefore, the applicant could not know the reasons for the Board's decision.

Regarding the standard of proof, specifically "suggest" the "potential for sustained production," the judge heard argument about scientific theories and hypotheses and how they are developed. This was because the legislation requires of the Board that it exercise its scientific and technical expertise when making decisions. The result was that the proper standard to apply is whether the suggestion of a possibility has been proved on a balance of probabilities. Although this might be interpreted as requiring no proof at all, the legislation was clear to the judge as requiring the applicant to put forward sufficient data and theories so as to satisfy the Board that the possibility is "more than a random one or based just on chance or unsupported speculation." The judge found that the Board directed its attention to the wrong question, specifically, whether the applicant "had proven, on a preponderance of probabilities, a likelihood of sustained production."

The judge set aside the Board's decision and remitted the matter back to the Board for reconsideration and full reasons. *See Petro-Canada* v. *Canada-Newfoundland Offshore Petroleum Board*, [1995] N.J. No. 258 (S.C.T.D.) (QL).

Gas Supply Contract — Force Majeure Clause — Whether Supplier can Claim Force Majeure when its Supply is Curtailed

A supplier (A) under a gas contract had its supply reduced by Nova because of pipeline failures in Nova's system. A in turn reduced supply to C on the basis that its contract with C was the for a small quantity and for the shortest term with no suggestion of a continuing relationship, therefore, it could best afford to lose that contract. C in turn purchased other gas at considerably higher prices to fulfil its own obligations under its contracts. When A reduced its supply to C, it claimed the benefit of a force majeure clause in its contract with C. At trial, A succeeded in taking the benefit of the clause, in part, because the loose language of the clause appeared to put no obligation on the seller to mitigate the effects of the force majeure event. C appealed the decision.

The Alberta Court of Appeal reversed the decision of the trial judge. Kerans, J.A. (for the Court) held that, in spite of loose language, the clause could not be interpreted broadly because that would allow the seller to escape its obligations under the contract upon the happening of any event at all in the business life of the seller, whether or not the event was significant, and whether or not the seller brought the event upon itself. This interpretation would let the seller terminate the contract almost at will and the language in the contract should not be interpreted in that manner. Kerans, J. held that the force majeure event must be shown to be substantially connected to the nonperformance of the contract; that is, the event has turned performance into a real and substantial problem. Performance has become commercially unfeasible. In this case, the seller had at least two options: either to prorate the gas to all its buyers, or to purchase alternate volumes itself to fulfil the contract with C. Insufficient evidence had been presented on these matters and a new trial was ordered. *See Atcor Ltd.* v. *Continental Marketing Systems Ltd.*, [1996] A.J. No. 131 (C.A.) (QL).

Alberta — Surface Rights — Compensation — Basis for Award

A land holder (P) sought amounts payable by an oil and gas company (C) for access to drilling locations on the Crown land on which P held grazing leases. The Surface Rights Board made an order fixing compensation on the basis of the pattern of dealings in the area between oil companies and private land holders. In the country, the Eastern Irrigation District (EID) was the largest private landowner and it owned over 40% of the lands. The EID had an agreement for access on its lands that implemented a comprehensive protocol under which the main oil company in the area paid higher rates for access to EID lands in return for significant benefits such as expedited access, a refund policy, access to EID water, streamlined site inspection, etc. C put forward evidence that these benefits were not available in agreements with other private land holders. Therefore, lower rates for access had been paid to other land holders. P claimed that it should get the benefit of the higher rates paid to the EID.

The Court held that the "pattern of dealings principle" is well established in Alberta law and it should be the basis for the award. That is, the amounts paid in comparable dealings in the area should provide the basis for the award. Comparable dealings means some similarity in the rights granted, the type of land, and the type of parties (among other things). Here, C led evidence of many other dealings with private land holders which it said established the necessary pattern and were comparable with this case. The Court held that these transactions did establish a pattern and that they were more comparable to the facts of this case than the EID agreement. Therefore, the Board was correct to use these transactions as the basis of its award and to ignore the EID agreement. The appeal was dismissed. See *Patricia Bar 4T Ranch Ltd.* v. *Chevron Canada Resources Ltd.*, [1996] A.J. No. 118 (Q.B.) (QL).

CANADA — MINING

Ontario — Mining Act Amendments

The Ontario *Mining Act* (R.S.O. 1990, c. M.14) has been amended by Schedule O of the *Savings and Restructuring Act, 1996* (S.O. 1996, c.1). The purpose of the new Act is to streamline government procedures and save money, in keeping with the Ontario government's plan to reduce its budget deficit.

The biggest change to note is the repeal of the old Part VII (Operation of Mines) and its replacement with a new Part VII - Rehabilitation of Mining Lands. The new Part VII also requires a closure plan but provides for a certification process for the closure plan. That is, if the closure plan is certified to meet the requirements it can be accepted for filing by the Director of Mine Rehabilitation, presumably with less inquiry than was formerly required. This procedure should simplify and streamline the process and require less work of the Director, although it may require some additional expense on the part of the proponent with respect to certification. Other changes include providing for the confidentiality of all financial information submitted to the Director in regard to the financial assurance required to be included with the closure plan, providing a definition of a mine hazard, and providing for emergency action in the case of a mine hazard that is likely to cause adverse effects. An additional change to note with respect to claim staking is that s.48(8) of the Act now provides that a transferee of a claim in good faith may restake the claim at any time if a dispute has not been filed. The re-staked claim may be deemed to be recorded on the date of recording of the original claim (s.48(8.1)).

British Columbia — Mineral Tenure Act Amendments

British Columbia's *Mineral Tenure Act* (S.B.C. 1988, c.5) has been amended by S.B.C. 1995, c.50, although the amendment is not in force yet. The main changes affect the jurisdiction of the Chief Gold Commissioner since the amendments transfer to him various activities formerly done by the Minister of the Lieutenant Governor in Council. These include the powers to cancel a free miner's certificate, to suspend exploration and production of minerals or to cancel a claim for non-compliance with the Act or the regulations, and to issue mining leases. In addition, s.1.1 provides authority to the two Ministers who administer the *Mineral Tenure Act* and the *Land Act* (R.S.B.C. 1979, c.219) to jointly make regulations prescribing what is a mineral and no compensation is payable to anyone because of that prescription. Section 11 has been amended to require that a claim-holder have a permit issued under s.10 of the *Mines Act* (S.B.C. 1989, c.56) before commencing a mining activity. Finally, s.37.1 prohibits production under a lease unless the lessee has a mine development certificate issued under the *Mine Development Assessment Act* (S.B.C. 1990, c.55) or a project approval certificate issued under the *Environment Assessment Act* (S.B.C. 1994, c.35). The amending act will come into force by regulation.

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Limestone Valley Update

*by Steven A. Kennett**

The Limestone Valley decision[1] was discussed in "Environmental Assessment in Alberta Meets the Rule of Law", a case comment published in the last issue of *Resources*. The applicants in this case sought judicial review of a decision by the Director of Environmental Assessment not to require an environmental impact assessment report (EIA report) for a proposed resort to be located near the town of Canmore.

Shortly after the publication of that commentary, the parties appeared before Madam Justice C.L. Kenny seeking clarification of her order.[2] Madam Justice Kenny indicated that her intention was to refer the matter back to the Director for his reconsideration, rather than to order an EIA report directly. Consequently, the extent of the environmental assessment required for the Limestone Valley resort remains to be determined. The Director's decision on this matter may provide an indication of how Madam Justice Kenny's decision will affect the exercise of his administrative discretion.

Madam Justice Kenny concluded that the Director's refusal to order an EIA report was patently unreasonable because it was made in the absence of any evidence contradicting concerns in two areas: impacts on the north-south wildlife corridor and cumulative effects.[3] The applicants had raised and substantiated these concerns prior to the Director's decision. Madam Justice Kenny also noted that "the government's experts concurred with the concerns expressed by the applicants."[4] On the basis of the record produced in court, therefore, the Director has no choice but to order an EIA report.

The Director's reconsideration of this matter might, however, take account of additional information, some of which might contradict the applicants' evidence regarding the project's implications for wildlife movement and cumulative effects. If such information is produced and has some *prima facie* credibility, could it justify a second refusal to order an EIA report?

While this question is difficult to answer in the abstract, a strong argument could be made that any such new information would, at most, demonstrate that there is uncertainty about the likely effects of the project. Furthermore, significant public concern regarding the project would undoubtedly remain. For reasons discussed in the case comment, a purposive interpretation of Alberta's environmental assessment legislation suggests that a refusal to order an EIA report under these circumstances might well be patently unreasonable.

The fate of the Limestone Valley proposal is now back in the hands of the Director. Environmental assessment in Alberta would be well served if, in addition to addressing the substantive issues before him, he took this opportunity to indicate how he intends to respond to the legal issues raised by Madam Justice Kenny's decision. Explicitness in this regard could contribute to the predictability and transparency of the decision-making process. In any event, anything less than a clearly reasoned decision supported by solid evidence may result in further litigation. Whether by administrative or judicial means, the Limestone Valley case could thus lead to a more precise definition of the legal constraints on Alberta's highly discretionary environmental assessment regime.

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Notes

1. *Bow Valley Naturalists Society and Canadian Parks and Wilderness Society (Alberta)* v. *The Honourable Ty Lund, Minister of Environmental Protection, Robert Stone, Director of Environmental Assessment and BHB Canmore Ltd.* (27 October 1995) Action No. 9501 10222 (Q.B.).

2. Clarification of the Reasons was given on 5 January 1996.

3. Limestone Valley decision, at 26-27, 29.

4. *Ibid.*, at 26.

Upcoming Course

Contract Law for Personnel in the Energy Business

The Canadian Institute of Resources Law is pleased to present its popular course on *Contract Law for Personnel in the Energy Business*. The course will be held on May 23 and 24, 1996 at the Ramada Hotel in Calgary. Aimed at non-lawyers in the energy industry who deal extensively with contracts, the course is open to the public.

The course examines such issues as how a contract is formed and terminated, the concepts of consideration and privity, judicial approaches to the interpretation of contracts, and damages. In addition, the course scrutinizes a number of clauses commonly found in energy industry contracts (for example, force majeure, independent contractor, choice of laws, liability and indemnity and confidential information.) The course does not focus upon specific types of contracts used in the industry but is geared for industry personnel at all levels whose jobs require them to understand the basics of contract law.

The course is conducted by Professor Nicholas Rafferty of The University of Calgary Faculty of Law and Institute Research Associate Susan Blackman. The course involves lectures by the instructors, as well as individual and group problem-solving sessions.

The registration fee is $425.00 and includes all materials and coffee both days. For more information or to register, please contact Pat Albrecht at: Canadian Institute of Resources Law, Room 3330, PF-B, The University of Calgary, 2500 University Drive NW, Calgary, Alberta, Canada, T2N 1N4 Phone: 403 220 3974 Fax: 403 282 6182.

Forthcoming Publication

Agricultural Law in Canada 1867-1995, by Marjorie L. Benson
ISBN 0-919269-43-5. $35.00

This book documents agricultural legal history during the twentieth century in Canada with particular reference to Saskatchewan. The book is in four parts. The first develops a classificatory model of agricultural legislation and examines the history of the principal regimes; the second classifies the conventional policy arguments for and against each type of regulation; the third observes that there is not much regulatory reform with respect to land use and land tenure, and that any attempt at reform has met with significant resistance; and the fourth summarizes the conclusions with respect to the processes of regulatory reform.

It is a valuable reference for lawyers and non-lawyers in government, industry, academia, consulting firms and non-governmental organizations, with a working familiarity of agricultural law and policy.

How to Order
All book order enquiries should be directed to: Book Order Department, Canadian Institute of Resources Law, Rm 3330 PF-B, The University of Calgary, Calgary, AB, T2N 1N4
Telephone: (403) 220 3200
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Payment or numbered, authorized purchase order must accompany all orders.
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Outside Canada prices are in U.S. dollars.

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