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Considering the "Need for the Project" - A Modest Proposal

*by Judith B. Hanebury**

With the proclamation of the *Canadian Environmental Assessment Act* ("CEAA") came a more detailed definition of the factors to be considered in a federal environmental impact assessment.[1] Section 16 of the CEAA describes these factors, some of which are mandatory, some discretionary. Paragraph 16(1)(e) provides that certain factors may be included in an assessment, such as the "need for the project". The inclusion of a consideration of these factors is discretionary and the discretion rests with the responsible authority where a project is being screened and the Minister of the Environment when the project is subject to a comprehensive study, mediation or assessment by a review panel.[2] Including a consideration of the "need for the project" in an assessment raises a number of issues such as when it should be considered, and how and against what it should be measured. The purpose of this paper is to consider some of the options available to address the questions of when and how a consideration of the need for a project should be included in a federal environmental impact assessment. A modest proposal based on the CEAA is then suggested.

History of Consideration of the "Need for the Project"

Prior to the enactment of the *Canadian Environmental Assessment Act*, federal environmental impact assessments occurred pursuant to the *Environmental Assessment Review Process Guidelines Order*[3] ("EARPGO"). Under EARPGO, the "initiating department" responsible for the assessment was to ensure that the environmental implications of all proposals for which it was the decision-making authority were fully considered.[4] Subject to the approval of the Minister of the Environment and the Minister of the initiating department, the consideration of a proposal by way of a screening or a panel review could include such matters as "the general socio-economic effects of the proposal and the technology assessment of and need for the proposal."[5]

When a new federal environmental impact assessment process was proposed it was the subject of considerable public comment and the issue of whether the "need for the project" should be a factor in an assessment was addressed by a number of parties.[6] Comments ranged from a complaint that the inclusion of need as a factor in the Act would "allow the federal government to substitute itself for developers, [to] re-evaluate the purpose or need for a project"[7] to a request that it be included in the bill as a non-discretionary requirement.[8] Ultimately, a consideration of the "need for the project" became a discretionary factor that could be included in an

Résumé

La *Loi canadienne sur l'évaluation environnementale* prévoit qu'une évaluation environnementale fédérale peut porter notamment sur la "nécessité du projet". Cet article examine en premier lieu la façon dont le processus d'évaluation environnementale en vigueur aux États-Unis prend en compte un élément semblable. L'auteur développe ensuite une proposition qui s'attache à définir les circonstances dans lesquelles il conviendrait d'examiner la "nécessité du projet" lors de l'évaluation environnementale fédérale ainsi que la façon dont cette nécessité devrait être jaugée.

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assessment. No criteria were established for when it should be included or how it should be measured.

Under the *Canadian Environmental Assessment Act* four panels are presently in various stages of the assessment process. The terms of reference for the Sable gas projects require the panel to take into consideration in its reviews of the projects the "need for the projects". The terms of reference for the Cheviot coal project proposed by Cardinal River Coals Limited require the panel to consider the "purpose of, need for and alternatives to the Cheviot coal project". The terms of reference for the proposed Voisey Bay mining development require the panel to take into consideration the "need for the undertaking." Lastly, the Terra Nova project terms of reference require the panel to consider the "need for the project". There was no requirement to consider the "need for the project" in the terms of reference for the Express Pipeline Project Joint Panel, which was the first panel under the CEAA.[9]

Judging by the terms of reference for the panel reviews occurring under the CEAA, it appears that a consideration of the "need for the project" by review panels may be more prevalent under the new Act than it was under the *EARPGO*. Despite this apparent increase, little guidance has been given to proponents, responsible authorities or panel members on when or how to include the "need for the project" in an environmental assessment. "Need for the project" is not addressed in the new draft *Guide to the Preparation of a Comprehensive Study*.[10] Similarly, the *Responsible Authorities Guide to the Canadian Environmental Assessment Act*[11] does not discuss when and how to include the "need for the project" in an assessment. Furthermore, the sections of the CEAA dealing with guidelines and regulations under the Act do not specifically address issues related to the inclusion of a consideration of the "need for the project" in an assessment. As a result, no guidance has been provided and proponents, responsible authorities, public participants in scoping sessions and the Minister of Environment must decide when the "need for the project" should be included for consideration in an assessment.

The American Experience

An examination of the American case law dealing with a similar provision is of some interest but provides limited assistance. The National Environmental Policy Act[12] ("NEPA") established the federal environmental impact assessment process in the United States in 1969. Subsections 102(c)(iii) and (e) require the assessment to include a consideration of alternatives to the proposed action. Federal government agencies are to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." A consideration of "need" for the proposed action is not mentioned in the Act.

Similarly, the Council on Environmental Quality "(CEQ") regulations under NEPA do not require a consideration of "need" but provide guidance on how alternatives are to be considered in an assessment[13] including the "no action" alternative.[14] The CEQ advises that the consideration of the "no action" alternative is appropriate in all assessments and if the no action alternative would result in predictable actions by others, those actions should also be considered.[15] Therefore, assessing the "no action" alternative can be a method of assessing the need for the proposed action, depending on how the assessment is conducted.

Comment by the courts on the adequacy of discussion in an assessment of the "no action" alternative has not been extensive.[16] In some instances the courts have upheld a limited discussion on the basis that a detailed discussion is not necessary as the no action alternative does not meet project goals.[17] For example, a proposal to build a link between two highways was found to be clearly in the public interest with the result that only an extremely limited consideration of the possible alternatives was required.[18]

In other instances the courts have upheld a limited consideration of the no-action alternative by the assessing agency on the basis that the consequences are obvious.[19] For example, the assessment of an application for an oil lease was found not to require a determination of the cost of the alternative of no action, ie. not proceeding with the lease, as the cost was obvious - any oil which might be found would not be found.[20]

There are some cases where the courts have found environmental impact statements inadequate if there is insufficient consideration of the no action alternative.[21] In one instance the Court found that the requirement for a thorough study and a detailed description of alternatives was "the linchpin of the entire impact statement." In granting an injunction to halt work on a highway, the Court noted that the Environmental Impact Statement treated the "crucial decision" to proceed with federal funding of the highway "not as an impending choice to be pondered, but as a foregone conclusion to be rationalized."[22] In a more recent decision the Court looked at the statutory scheme under NEPA and found that an informed and meaningful consideration of alternatives, including the no action alternative, is an integral and essential part of the scheme.[23]

In short, there is little in the American experience that provides useful guidance. Despite decades of experience with NEPA and court consideration of the issue, there is no definitive position in American law on the implementation of a consideration of the no alternative option. While generally the Courts acknowledge that the law requires that it should be considered in every assessment, the rigour of the necessary consideration varies widely with the result that a consideration of

the "need for the project" in a federal assessment is, in essence, discretionary.

When to consider "Need for the Project"

A decision on when to consider the "need for the project" in a federal assessment is based on the approach of the assessment agency, ie. the responsible authority undertaking the screening or the Minister in the case of a panel review or comprehensive study. The approaches possible lie within two poles, the economic approach and the environmental approach. These two poles will first be explored and then an approach consonant with the scheme of the CEAA will be considered.

Economic Approach

An economic approach is founded on the view that, in a free market economy, the only person entitled to assess the "need for the project" is the proponent. If the proponent is prepared to risk the costs incurred in bringing forward the project, then there is a "need for the project". If the need does not materialize, then it is the proponent who suffers the consequences. Generally it is assumed that the prudent developer has undertaken an economic analysis and is satisfied that the project is financially viable and will meet a perceived need.[24] As a result, the assessing body should not be involved in a consideration of the "need for the project" when there is a private proponent.

When the proponent is a public entity, ie. the government itself is proposing the project, or public funds or public lands are being used for the project, it could be argued that there is some justification for a consideration of the "need for the project".[25] In that case it is the people of Canada who are playing the role of developer or financier. Even in that instance though, it could be argued with an economic approach that the power to consider the "need for the project" has been given to the government by way of a democratic election, with the result that further consideration is not required and the public developer, like the private developer, should be permitted to proceed without a consideration of need by the assessing body. Simply put, with an economic approach, need if considered at all in an assessment, would be included only when the proponent is the government or federal lands or funding is required.

Environmental Approach

With an environmental approach to the question of when the "need for the project" should be considered, the argument is based on the intrinsic value of externalities. Whenever there are environmental effects, then public resources are being used and there should be a consideration of the "need for the project" in light of the use of those public resources. The essence of environmental impact assessment is to consider the use of a broad range of public resources. Environment is broadly defined in the CEAA to include, in addition to the land, water and air usually seen as public resources, "all organic and inorganic matter and living organisms, and the interacting natural systems" that include those elements. Within this definition biodiversity itself could be seen as a public resource. An environmental approach to a consideration of the "need for the project" is an example of the utilization of the public trust doctrine, a doctrine with its roots in ancient Rome where it was recognized that the air, sea and seashore were common property and belonged to all.[26]

With an environmental approach, a consideration of the "need" for the project should be part of every assessment where there is the potential for environmental effects as it provides a context within which the use of public resources can be considered. The protection of those resources is the paramount consideration and only proponents who can demonstrate a need for their use will be allowed to proceed.

An Approach Within the CEAA

Within the confines of the CEAA, there are problems with using the economic or the environmental approaches to deciding if the need for a project should be considered as a factor in an assessment. First and foremost, Parliament has conferred a discretion on the responsible authority or the Minister of the Environment to decide if the "need for the project" should be included. In the case of the economic approach, Parliament cannot have intended to bestow a discretion that would never be used. Conversely, in the case of the environmental approach, Parliament would not have bestowed a discretion if it intended the "need for the project" to be assessed in every case.

As there is nothing in the CEAA[27] describing specifically when the need for a project should be included in an assessment, the overall purpose of the Act and the scheme of the Act must be examined in an attempt to ascertain when need should be included in an assessment and how it should be considered. The preamble to the CEAA states that the Government of Canada seeks to achieve sustainable development and then describes in very general terms how it will do so.[28] The purposes of the Act are set out in s. 4 and include the encouragement of "responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy."[29] The Act defines "sustainable development" to mean "development that meets the needs of the present, without compromising the ability of future generations to meet their own needs."[30] From both the preamble and the purpose section of the CEAA it would appear that one of its primary purposes is to promote sustainable development.[31]

Turning to the specific provisions of the Act, s. 16 provides that every assess-

ment of a project must include a consideration of the significance of the environmental effects of the project. It is the determination of the significance of the environmental effects of the project, including cumulative effects, that is the foundation of the scheme underlying the Act. After the completion of an environmental assessment by way of a screening, the responsible authority (assessing government department or agency) must take a course of action in respect of the project. Where the responsible authority is of the view that the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, it may not take any steps to permit the project to proceed. If the responsible authority is of the view that the project is likely to cause significant adverse environmental effects that could be justified, it is to refer the project to a panel review or mediation.[32] Once the panel review is completed, the responsible authority is to take a course of action in respect of the project, after taking into consideration the panel report. Where the project is likely to cause significant adverse environmental effects that can be justified in the circumstances, the course of action to be taken is to proceed with the federal approvals or authorizations that would permit the project to be carried out.[33]

Although the Canadian Environmental Assessment Agency has produced a guide on determining the significance of adverse environmental effects,[34] no guidance has been given on how to determine if those significant adverse environmental effects are justified in the circumstances.[35] A decision on whether or not significant adverse environmental effects can be justified is best made in relation to some standard, criteria or form of measurement. A consideration of the "need for the project" is an obvious and logical tool for deciding if a project should be allowed to proceed despite significant adverse environmental effects. It permits a weighing or balancing of the facts contained within the confines of the assessment[36] to come to an overall decision on the acceptability of the project.

Such an approach makes sense within the scheme of the Act and means that the "need for the project" would be included as a factor in an assessment only in certain situations. With this approach, need would be included whenever it appeared as a result of the scoping or preliminary review of the project that the project could have significant adverse environmental effects. Since projects referred to a panel review or on the comprehensive study list are usually those with the potential for significant environmental adverse effects, the "need for the project" would usually be a factor in their assessment.

If a consideration of the "need for the project" is included in an assessment on this basis, the next question to be addressed is how it should be measured when deciding if a project with significant adverse environmental effects can proceed. Need is a very subjective term as evidenced by that old adage that one man's need is another man's want. To use need as the basis for justifying the approval of a project with significant adverse environmental effects, the word must have some consistent meaning. In an assessment context, need has often been considered in terms of economic benefits to society, with those benefits weighed against the environmental consequences of the proposal. As the Act provides no specific guidance in this case as to the approach to be taken, assistance can only come from an examination of its purpose and scheme.

As noted, one of the overarching purposes of the CEAA is the promotion of sustainable development. Sustainable development is defined in the Act in terms of the needs of both present and future generations. If the Act is to promote sustainable development, then the "need for the project" should be measured within that framework. In the context of the Act, need must mean an assessment of whether the project is needed by the present generation and will not compromise the ability of future generations to meet their own needs. Only if those criteria are met, can it be argued that there is a "need for the project" that could balance the potential environmental consequences of the project.

Such an approach would avoid the traditional pitting of environmental concerns against short term economic benefits. Projects with significant adverse environmental effects that could impair the ability of future generations to meet their own needs would not be allowed to proceed. No need for them would have been demonstrated so no justification could occur.

In summary, it is proposed that the "need for the project" be a factor in every assessment where a preliminary review or scoping of the project indicates the potential for significant adverse environmental effects. In the assessment, the "need for the project" would be considered within the framework of the definition of sustainable development in the Act. A project likely to have significant adverse environmental effects could only proceed if it were found that it was needed, ie: it met the needs of the present without compromising the ability of future generations to meet their own needs.

Conclusion

It is recognized that this is a modest proposal and is designed to work within the confines of the present legislation. No attempt has been made to suggest amendments to the Act.[37] It is acknowledged that . there could be other circumstances where the need for a proposal should be considered in an assessment. It is also acknowledged that sustainable development is a concept subject to numerous interpretations and further consideration and acceptance of the meaning of the concept must occur. However, if the CEAA is to be a tool for the achievement of sustainable development in Canada, projects with potential signifi-

cant environmental effects can only be allowed to proceed after careful consideration within a sustainable development paradigm. It is suggested that this modest proposal would help this to occur.

* *Judith Hanebury is Counsel at the National Energy Board. The views expressed herein are those of the author and not those of the National Energy Board.*

Notes

1. S.C. 1992, c. 37 (proclaimed in force 19 January 1995).
2. It should be noted that the drafting of the paragraph is confusing. It has been interpreted to mean that the Minister decides on the inclusion of these factors in a screening and the responsible authority when the project will be subjected to a comprehensive study, mediation or panel review. See Steven Penney, "Assessing CEAA: Environmental Assessment Theory and the Canadian Environmental Assessment Act", 1996 (6) 4 J.E.L.P. 243 at 263.
3. SOR 84-467.
4. *Ibid.*, at s. 3.
5. *Ibid.* at s. 4(2) and 25(3). Despite the ability to include "need for the project" in an assessment, it was not included in the mandate of every panel review. See, for example, NWT Diamonds Project Report of the Environmental Assessment Panel June 1996. This panel was formed pursuant to the *Environmental Assessment Review Process Guidelines Order*. Other proposals subject to a panel review did deal with the "need for the project", such as the Port of Quebec Expansion Master Plan and the Roberts Bank Port Expansion Plan. See Canada, Environmental Impact Assessment - A Planning Tool for Port Development Projects (Occasional Paper No. 15) by Guy Riverin (Ottawa: Federal Environmental Assessment Review Office, 1988).
6. See, for example, Legislative Committee on Bill C-13, *Comments on Bill C-13 as Currently Proposed* (Submission) by R.B. Gibson (Ottawa: 7 November 1991), West Coast Environmental Law Association, *Recommendations for Improvements to Bill C-13, the Proposed Canadian Environmental Assessment Act* (22 October 1991), Canadian Arctic Resources Committee, *The Proposed Government Amendments to Bill C-13 the Canadian Environmental Assessment Act* (Discussion Paper) by S. Hazell (17 October 1991).
7. Hydro-Québec, *Bill C-13 A Federal Trojan Horse* (Comment) summarizing the legal opinion prepared for the company by the law firm of Lavery, de Billy (May 1992).
8. See, Minutes of Proceedings and Evidence of the Special Committee of the House of Commons to Pre-Study Bill C-78, An Act to Establish a Federal Environmental Assessment Process, Issue 3 (1 November 1990) at 9 and Issue 4 (6 November 1990) at 22. See, as well, R. Cotton & G. Bell, "Principles of Environmental Assessment at the Federal Level" in *Sustainable Development in Canada: Options for Law Reform* (Ottawa: The Canadian Bar Association, 1990) 72 at 74.
9. It is possible this decision was made by the Minister on the basis that the National Energy Board would consider the "need for the project" as part of its deliberations under s. 52 of the National Energy Board Act which requires the Board to find the pipeline to be in "the public convenience and necessity" before it can recommend it be issued a certificate to construct and operate.
10. Canadian Environmental Assessment Agency - Draft 3 (June 1996).
11. Federal Environmental Assessment Review Office (September 1994).
12. 42 USC 4321 et seq.; amended by PL 94-52 (3 July 1975); PL 94-83 (9 August 1975).
13. 43 FR 55994 (1978).
14. *Ibid.*
15. Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations* (Question 3) 46 Fed. Reg. 18026, 18027 (1981).
16. D.R. Mandelker, *NEPA Law and Litigation*, 2nd ed. (New York: Clark Boardman Callaghan, 1996) at 10.53.
17. *Ibid.* at 10-54.
18. *Iowa Citizens for Environmental Quality, Inc., et al.* v. *Volpe*, 487 F. (2d) 849 at 852-53 (8th Cir. 1973).
19. *Supra*, note 16 at 10-53.
20. *Conservation Law Foundation of New England, Inc., et al.* v. *Andrus, et al*, 623 F. (2d) 712 at 717 (1st Cir. 1979).
21. *Supra*, note 16 at 10-54.
22. *Why? Association* v. *Burns*, 372 F. Supp 223 at 247-49 (D. Comm 1974).
23. *Bob Marshall Alliance, et al.* v. *Hodel*, 852 F. (2d) 1223 at 1228-29 (9th Cir 1988).
24. Usually such an analysis does not take into consideration environmental effects, as those are externalities and difficult to assess financially. Consideration is given to the costs of mitigation or necessary regulatory approvals.
25. Under the CEAA s. 5 provides for certain matters to "trigger" an assessment. The use of public funds (s. 5(1)(b)) or the federal government as the project proponent (s. 5(1)(a)) or the use of public lands (s. 5(1)(c)) will trigger an assessment in certain circumstances.
26. For an analysis of the doctrine and its development in the United States and Canada, see C.D. Hunt, "The Public Trust Doctrine in Canada" in *Environmental Rights* at 151.
27. Or even in the supporting material issued pursuant to the Act. Such supporting material, unless by way of regulation, would not be binding in any event.
28. *Supra*, note 1. It states:
"Whereas the Government of Canada seeks to achieve sustainable development by conserving and enhancing environmental quality and by encouraging economic development that conserves and enhances environmental quality; whereas environmental assessment provides an

effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development..."

29. *Supra*, note 1 at s. 4(b).
30. *Supra*, note 1 at s. 2(1).
31. The role of environmental impact assessment in relation to sustainable development is the subject of some debate. See, Penney, *supra*, note 2, Gibson, *supra*, note 6, *The New Canadian Environmental Assessment Act: Possible Responses to its Main Deficiencies*, (1992) 2 J.E.L.P. 223 and P.S. Elder, *Environmental and Sustainability Assessment*, (1992) 2 J.E.L.P. 125. Some authors note that by the time a proposal reaches the assessment stage it is too late to really consider the "need for the project".
32. *Supra*, note 1 at s. 20(1).
33. *Supra*, note 1 at s. 37(1). See, as well, s. 37(1.1) which outlines the involvement in this process of the Governor in Council.
34. Federal Environmental Assessment Agency, *A Reference Guide for the Canadian Environment Assessment Act - Determining Whether a Project is Likely to Cause Significant Adverse Environmental Effects* (September 1994).
35. *Supra*, note 1 at s. 58(1)(a) provides that the Minister may issue guidelines establishing criteria to establish whether a project is likely to cause significant adverse environmental effects or whether such effects are justified in the circumstances.
36. Rather than political, policy or other considerations outside the scope of the assessment.
37. Others, including the writer, have suggested that project specific assessment, without a broader assessment framework for policies and land use plans, is deficient. See J. Hanebury, *Environmental Impact Assessment as Applied to Policies, Plans And Programs* in Law and Process in Environmental Management (Calgary: CIRL, 1993).

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Recent Developments in Canadian Oil and Gas Law

*by Nigel Bankes**

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International concession agreement - Carved out interest - Amendment of the concession agreement - Effect of amendment on the carved out interest.

Oceanic, with partners, negotiated a concession agreement with the Greek State in relation to a property in the Aegean Sea in 1970. With the change of government in Greece in 1973, the concession was replaced by an Exploration and Development Agreement (EDA) in 1976. In 1976 Oceanic assigned its rights under the EDA to Denison. Oceanic retained an interest pursuant to a Net Earnings Interest Agreement (NEIA). The drafting of the NEIA incorporated some of the terms from the EDA.

Development costs were higher than anticipated and prices lower. Denison faced the prospect of premature abandonment of the property because of the onerous fiscal terms of the EDA. Negotiations between Denison and partners and the Greek government resulted in an amendment to the EDA that had a negative impact on the calculation of Oceanic's entitlements under the NEIA.

Oceanic argued that: (1) the EDA amendment did not affect the calculation of Oceanic's interest under the NEIA, (2) in the alternative, if the NEIA incorporated terms from the EDA as amended from time to time, then Denison was in breach of an obligation of good faith in negotiating the amendment to the EDA. The trial judge held that the parties to the NEIA must have intended to preserve the original formula as established in the 1976 EDA. This interpretation was consistent with reasonable commercial practice, and the subsequent conduct of the parties. Although it was not strictly necessary to deal with the good faith argument, the court went on to say that Oceanic could not have prevailed on the basis of the duty of good faith since there was no evidence that Denison acted deliberately to achieve a result which benefited Denison at Oceanic's expense. Furthermore, Denison was simply one of a number of parties to the EDA amendment negotiations with the Greek government. However, the court would have been prepared to imply a term in the NEIA to the effect that any amendment that reduces Oceanic's return disproportionately to Denison's was ineffective. *Oceanic Exploration Co. v. Denison Mines Ltd* [1996] OJ No. 4387 (QL Systems).

The Saskatchewan Court of Appeal has upheld the trial judgement in Lemmons v. Gannon on the independent operations clause of the CAPL Agreement.

The Saskatchewan Court of Appeal [1996] SJ No. 762 (QL Systems) has upheld most of the holdings of the trial judgement in *Robert Lemmons and Associates v. Gannon Bros. Energy Ltd* . The broad significance of the case relates to the court's interpretation of the Canadian Association of Petroleum Landmen's (CAPL) form of operating agreement. The case proceeded before the Court of Appeal on the basis that Lemmons went non-consent at the completion stage of the 9-5 well and the contentious issues related to the calculation of the penalty. The court accepted the trial judge's conclusion that the penalty should be calculated on the basis of gross completion costs net of monies received by Gannon under a government incentive grant. The court noted that the CAPL agreement was silent on this point but that it was reasonable to deduct incentive payments received. The court also agreed with the trial judge that the penalty should only apply to completion and operating costs and not to drilling costs since Gannon did not go non-consent until the casing point election. However, the court disagreed with the trial judge's conclusion that the 300% penalty payable on completion costs should be calculated by reference to Lemmons' 50% interest in the property. In the court's view, the CAPL provisions led to the conclusion that the penalty was payable on the total amount of completion costs net of incentive payments received.

Court interprets an indemnity clause in a standard from drilling contract to require the operator to indemnify the contractor for the loss of the rig during a wild well blowout.

The contractor agreed to drill a well for the operator under the terms of the Canadian Association of Oil Well Drilling Contractors, Standard Day Work Contract 1993 (Revised). The rig was destroyed in the course of a blowout. The parties put two questions to the Alberta Court of Queen's Bench: (1) which party is responsible for physical damage to the rig; and, (2) must the operator indemnify the contractor for the economic losses flowing from the destruction of the rig? The general scheme of the liability and indemnity clause of the contract was to make the contractor responsible for any damage to any of its equipment while above ground, and to entitle the contractor to the benefit of an indemnity for down hole equipment and losses. However, the contract contained a specific clause dealing with wild wells: "Operator

shall be liable, regardless of the fault or negligence of any person or party howsoever arising, for the cost of gaining control of any blowout or wild well, as well as the cost of removal of any debris, and shall indemnify contractor from and against any and all actions, losses, costs damages and expenses thereby suffered or incurred by Contractor." The court held that this clause varied the general allocation of risk referred to above and held that it accorded the contractor a full indemnity for all its physical losses. The clause was not confined to indemnifying the contractor for losses that it might suffer when sued by third parties. The contract was ambiguous on the question of economic loss. The court ordered a trial on the issue of economic loss anticipating that evidence of a custom in the industry might clarify the ambiguity. *Brinkerhoff International Inc. v. Numac Energy Inc.* [1996] AJ No. 883 (QL Systems).

More detailed versions of these three digests may be found in *Canadian Oil and Gas* published by Butterworths.

** Nigel Bankes is Professor of Law at The University of Calgary and is the Canadian Oil and Gas reporter for the Rocky Mountain Mineral Law Foundation Newsletter.*

New Board Member

The Institute has a new Board Member effective November, 1996.

Graham G. Baugh practices in the Calgary offices of the law firm of Blake, Cassels & Graydon. His practice focuses in the areas of energy and corporate/commercial law. Mr. Baugh has had extensive experience in natural resources matters both domestically in Canada and on the Pacific Rim while living in Hong Kong. He is a member of the Canadian Petroleum Law Foundation.

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