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No Place in the Boardrooms of the Nation

by Alan Scarth, Q.C. *

The Thesis:
Environmental regulators in both United States and Canada, because of their background as assessors of government projects, and because of past uncertainties in the science of ecosystem sensitivity, have fallen into the practice of trying to control industry instead of confining themselves to controlling ecosystem impact by setting clear limits on biospheric outputs. In their efforts to exercise this control, they second-guess private sector judgments of markets, technology and even profitability.

Business leaders in United States became so resentful of this interference that they campaigned, through Congress, to "defund" the U.S. Environmental Protection Agency. There was a real danger that the baby would be thrown out with the bath water, as hard-won legislative protection of essential resources was caught up in the general attack.

Here in Canada we are more tolerant of bureaucracy, but we are hearing similar expressions of frustration as business plans are delayed and distorted by an environmental assessment process which does not present clear impact targets, but instead tries to co-opt boardroom and plant floor decisions.

Unless we act quickly to persuade Canadian environmental assessors to withdraw to the plant boundaries and let business people get on with their work, we risk a modified form of the American environmental revolution in Canada, with the consonant danger of losing some fundamental resource protection.

The Context:
The administrative context of Canadian environmental assessment is unexceptional in a federal state. A federal process has been legislated to assess environmental impact of development involving federal funding, federal land or areas of federal constitutional jurisdiction. Parallel processes, with procedural variations, have been legislated by the provincial governments in their more comprehensive areas of constitutional jurisdiction.

As always happens, a company of specialists has coalesced around the regulatory process: administrators, members of panels or commissions, lawyers, consultants and activists.

Résumé

Aux Etats-Unis aussi bien qu'au Canada, les organes de réglementation de l'environnement, en raison de leurs antécédents dans le domaine de l'évaluation de projets gouvernementaux et du manque initial de données scientifiques sur la vulnérabilité des écosystèmes, ont contracté l'habitude d'essayer de contrôler l'industrie plutôt que de se borner à contrôler les impacts industriels sur les écosystèmes en imposant des limites précises aux émissions dans la biosphère. En s'efforçant d'exercer ce contrôle, ils font des conjectures sur le jugement du secteur privé en matière de marchés, de technologie et même de rentabilité. Cet article considère les raisons historiques de cette invasion de la salle du conseil du secteur privé ainsi que ses effets néfastes, et suggère le moyen d'y mettre un terme par directive politique ministérielle.

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And, as always, these people tend to defend the process in which they have invested, without questioning the role it has assumed.

Those on the administrative side of the process have been preoccupied with the negotiation of federal/provincial agreements which will better integrate the two levels of assessment.[1] This is exemplary, because uncertainty whether the federal process will be triggered by a proposal for development has been a chronic concern when new businesses are planned.

However, this "harmonizing" initiative is seen by business people, if it is noticed at all, as nothing more than a long overdue settlement of a typical federal/provincial turf dispute. It does not address the invasiveness of both the federal and provincial processes, which is their major concern.

The Objective of Environmental Assessment:

It may be that the obvious does need restating. The objective of environmental assessment is to assess the impact of development on the ecosystem affected, and to manage that impact.

The objective is not to manage the business which causes the impact, although that is precisely what our current process seeks to do.

With sustainable development as an ideal, our environmental assessment process should be directed to establishing the carrying capacity of the ecosystem to be affected, and then to specifying licence conditions for proposed developments which will keep their impact within that carrying capacity.

The impact of raw material acquisition is a first consideration, but once that is settled, the issue becomes one of plant outputs. These should be measured and controlled at the "end of the pipe". The process should dictate the permissible limits of ecosystem impact as measured in the air and water at the boundary of the plant, and in the earth beneath it.

The space within these points of measurement, including the boardroom and the plant floor, should be the preserve of the private sector.

The invasion of the private sector preserve:

In our Canadian version of the free enterprise system, we accept conventional constraints on entrepreneurial decisions, but we like to believe that in three essential areas, the entrepreneur should have the call. First, the entrepreneur must be free to decide if there is a *market* for the product. Second, the entrepreneur must be free to select the *technology* by which the product is to be produced. And third, the entrepreneur, when putting money on the table, should have the privilege of deciding whether the enterprise will make a *profit*.

Our Canadian environmental assessment process intervenes in each of these areas of decision making.

Decision One: Forecasting the market: Is this new industry needed?

To those outside the environmental assessment process loop, it may seem astonishing that in the name of environmental protection, this market decision is being made by regulators and panellists most of whom have no business experience, and those who do rarely have experience in the industrial sector in which the proponent proposes to invest.

It might be thought that when an entrepreneur is prepared to risk a substantial capital investment on the strength of market forecasts by skilled experts whose business it is to market the product, that entrepreneurial commitment should be taken as the best evidence that the industry is needed. Unfortunately this logic has not yet persuaded the regulators.

Departmental administrators and panels of environmental scientists, engineers, administrators and lawyers, are frequently mandated to judge the "need and justification" for new industry. Under this mantra, they substitute their judgment of the market for the entrepreneur's.

For those who may find this hard to believe, here are two examples:

"With respect to the need for the refinery, the Panel concluded that (the proponent) had made a strong case as to the existence of a "market window" to exploit. The precise timing of market opportunities, however, may be less certain than (the proponent's) predictions."

> A 1978 report by a federal/provincial Panel in Ontario consisting of seven members, none with marketing credentials, assessing the environmental impact of a proposed uranium refinery.[2]

"It is the view of this Panel that the production of (the product) is a technically feasible proposal. The uncertainty lies in the marketplace; the Panel has not been provided with convincing evidence regarding the market for this product."

> A 1991 report by a joint federal/provincial Panel in British Columbia consisting of a lawyer, a doctor of environmental studies, and an engineer, assessing the environmental impact of a proposed chemical plant.[3]

These are typical of the market judgments which have been required of panels assessing private sector and public sector industrial proposals. The practice continues. Panels assessing proposals with capital commitments in the hundreds of millions of dollars are routinely mandated to report on the need for the investment.

The question is not the quality of the panel decisions, which, given the fact

that the panellists are out of their fields, cannot be of the highest. The question is why they are required to make market decisions in the first place. As Samuel Johnson said of another professional excursion which he considered inappropriate, it is "like a dog's walking on his hinder legs. It is not done well, but you are surprised to find it done at all."

How did we let this happen?

The requirement that a proponent show the need for a new industry has its roots in the early history of the environmental assessment process. The original Canadian process was the Environmental Assessment and Review Process Guidelines, more familiarly known by its acronym EARP.

These EARP Guidelines were primarily designed for the assessment of government proposals. There was therefore some logic in giving the environment Minister the right to ask whether there was really any need for the proposed expenditure of public funds, given the anticipated environmental impact. Using an environmental panel as the instrument to recommend a policy response was a bad fit, but the question was understandable, and the panel being in place, it was expedient to let the panel try to answer it.

The EARP process, as it underwent judicial interpretation, proved not to be just a set of guidelines for government departments. The courts found EARP to be the law of the land, a legal process which reached beyond departmental projects into the private sector and was triggered every time a business proposal crossed a line of federal jurisdiction. And as EARP began to be applied to private sector projects, the administrators of the process naturally began asking incredulous entrepreneurs the question they were accustomed to asking their peers in government: Is there really any need for what you propose to do?

Provincial jurisdictions followed suit. The ubiquitous phrase "need and justification" was coined, and the requirement that private sector proponents show the need and justification for their business was inserted in guidelines for project assessment on a routine basis by environmental regulators nationwide.

Decision Two: What technology to use in the business?

The co-opting of this decision by the environmental assessment process also has its roots in interdepartmental regulation and the assumption that there are no holds barred when one federal department is dealing with another. But there has been another and more understandable motivation, arising from the fact that the science of the measurement of industrial outputs of wastes and of their potential damage to the biosphere has been slower to develop than the industrial technology which produces them.

It is less than twenty-five years since scientists like James Lovelock, of Gaia fame, and his contemporaries, began designing sensitive equipment for biospheric analysis, and learning to interpret the results. The global carbon dioxide cycle, and the mechanism by which CFC's destroy the ozone layer, are two well known products of this research.

It so happened that the environmental assessment process was just taking form in Lovelock's time. When the National Environmental Protection Act was passed by the U.S. Congress in the dying hours of 1969, the newly appointed regulators looked out on a scientific world where the chemistry and biology of biospheric impact was almost unknown, ecosystem relationships almost unexplored, and even the word "environment" unfamiliar to a great majority of the public. It is understandable that in the absence of the science which would permit them to set "end-of-the-pipe" standards, these early regulators saw no alternative but to ensure that industry used the best available control technology (BACT) to minimize the damage to the biosphere.

Twenty-five years is a long time in the scientific world, and the research people have now been able to establish standard permissible limits for almost all substances detrimental to the biosphere. The regulators can now safely withdraw to the end of the pipe at the plant boundary, but they show no signs of doing so. The BACT philosophy persists.

Just as progress and change in production technology is always going to be with us, there will always be new biospheric outputs to be dealt with. This, however, is not an argument for BACT, but rather a telling criticism of it. If we don't understand the biospheric effect of what an industry is putting out, fiddling with the manufacturing technology is nothing more than a form of displacement activity which gives regulators the feeling they are doing something and lulls the public to sleep.

Faced with new outputs, the best available expertise should be directed to understanding the biospheric effects and setting appropriate limits. The entrepreneur can then decide whether to make a capital commitment on the strength of equipment which is designed to comply with those limits. The technology either works or it doesn't. Whether it is "best available" is irrelevant.

The British Columbia Ministry of Environment gives us one of the more succinct BACT definitions:

"Currently available, state-of-the-art control technology which is proven and has been successfully applied for at least one year in similar facilities in the Province or in other jurisdictions, and which is reasonably cost effective as determined by the Ministry."[4]

The Ministry of Environment and its appointed panel members decide what "BACT" is, and whether the use

of that technology should become a condition of licence.

We are not talking here about the technology required to avoid a catastrophic event like an explosion or an oil spill, in which cases the state is justified in ensuring that pre-emptive measures are taken to protect the public domain. We are talking about the technology required to control emissions or effluents or earth contaminants for which end-of-the-pipe standards exist or can be prescribed. BACT applied in tandem with these end-of-the-pipe standards is a belt and suspenders exercise, an unnecessary duplication of effort.

The 1990 panel report which cited the BACT definition went on to describe a typical government involvement in a private sector technology decision:

"The Ministry indicated that if the mill expansion is approved, they would amend the existing permits based on this (BACT) concept. They noted that the company had agreed to this approach, and that the BACT approach would result in predicted waste discharge levels and stack emissions below current objectives or proposed regulations....The federal Department of Fisheries and Oceans and Department of the Environment also expressed satisfaction with the technological standards adopted in the (proponent's) proposal. They stated that the proposed equipment... has a proven record of operation in performing to standards."[5]

It matters not for purposes of this discussion whether the proponent company willingly or reluctantly engaged in this technology negotiation. The bottom line is that we have environmental regulators involved in the private sector's selection of technology. BACT, which began as a transition measure, has now become a permanent part of the process.

The EPA was the originator of BACT, and in its glory days (which ended with the election of a Republican majority in Congress in November of 1994) did not hesitate to select and mandate technology in tandem with monitoring requirements.

In a 1993 press release quoting Attorney General Janet Reno on the need to enforce environmental laws, and describing the enforced installation of millions of dollars worth of equipment in more than a dozen major manufacturing plants, EPA gets down to specifics:

"EPA believes that the introduction of this technology, called Regenerative Thermal Oxidation, will encourage its use by other companies emitting these pollutants, and should create additional jobs in the pollution-control manufacturing industry."

It so happened that in the first plant in which this mandated technology was installed, the equipment failed and the plant had to be shut down at great cost. But whether this application of the technology should have been tested operationally before being mandated, is not the question. The question is why an agency with authority to require monitoring of emissions and to shut down plants which don't comply, should get involved in technology in the first place.

Here in Canada, it is commonplace for proponents to be asked to submit plans and specifications for all control equipment and storage facilities. The scrutiny of these, with supplemental questions, can use up months of the time of business planners and of the regulators themselves, who are increasingly stretched as their departmental budgets are cut. If the proposal goes to a panel, more months pass as panellists valiantly try to understand the complexities of industrial technology, intervenors take their places at the drafting table, and the executive team, as the price of a licence, patiently responds.

This invasion of the private sector preserve has a particularly dampening effect on the development of industry using new industrial processes and new control technology. The regulators, having requested and received drawings and specifications describing technology they have not seen before, and for which there is no readily available precedent on file or on Internet, tend to become paralyzed by the responsibility of approving a system which might not work. This is a concern to which the chief executive officer of the proponent can relate, but the difference is that it is the CEO's job to make a decision and get on with it.

Because of this tendency to delay those proposals using new technology, the statistics for licence application processing time are unreliable indicators of the efficiency of our Canadian regulatory system. Short track processing for conventional businesses produces low <u>average</u> turn around times for licencing, which are then put forward as proof of the responsiveness of the process. These averages hide the disturbing fact that the very industries which we hope will take us into the next millennium of sustainability are being delayed beyond their windows of opportunity. In the uneven field of new technology, Samuel Johnson's dog walking on its hinder legs not only doesn't walk well, it walks so slowly that it gets in the way of progress.

The solution once again appears obvious. Executives prefer to make their own mistakes where their corporate money is involved. Our regulators should withdraw to the plant boundaries, set end-of-the-pipe standards, and leave the executives to decide by what technology these standards are to be met.

The dividends of this change of practice would not only be the saving of precious months of plant completion time, but also the saving of the equivalent time of our hard-pressed environmental regulators who would be free to concentrate on the job which they should be doing

and for which they have unique expertise: monitoring the end of the pipe.

Decision Three: Will the business make a profit?

Samuel's dog walks unafraid into even this, the most sacrosanct area of private sector decision making.

In the early 1990s, a consortium which included major private sector mining companies proposed to develop a uranium mine in eastern Saskatchewan. A 1993 joint federal/provincial panel, consisting of a chemist, a mining engineer, a first nation's representative, an ecologist, and a community health expert, ventured to second-guess these mining companies on their commercial judgment of profitability:

"Low uranium prices during the last decade have provided little assurance that present and future uranium mining ventures can remain economically viable...although the (proponent's) mine was initially proposed in 1991 as a stand-alone project, the Amendment issued in October, 1992, suggested the situation had significantly changed in a period of only a few months. It appeared that an independent mine was now no longer viable...the impression is thereby left that the financial viability of the project is tenuous. It is difficult to justify the environmental damage this project would cause when its profitability may be doubtful. Low profitability would also reduce possible revenue sharing with northern communities."[6]

This earnest diagnosis by a collection of inappropriate disciplines reminds us of Stephen Leacock's story of his experience on an ocean voyage soon after he had been made an honorary Doctor of Laws. A famous actress was on the passenger list, and when she slipped and hurt a shapely leg, a call was broadcast for a doctor. Leacock hurried to be at her side, but was disappointed to find that a Doctor of Divinity had got there first.

As with market and control technology decisions, it is inappropriate to ask environmental regulators and panellists to decide whether a proponent will make a profit. In all three cases, we are asking these people to do more than they can or should.

Private profit and public profit are different concepts

It will have been observed that the Panel above quoted, in its wide-ranging dissertation on profitability, not only drew the conclusion that replacement of a single corporate proponent by a joint venture of several mining companies implied that the "viability of the project is tenuous"; it also, in its concluding sentence, raised the new perspective of public benefit, which can be seen as "public profit":

"Low profitability would also reduce possible revenue sharing with northern communities."

The requirement that the public profit from a proposal is not new. Where the public domain is proposed to be significantly and irrevocably changed, a cost/benefit analysis has been part of the environmental assessment process since earliest days.

In the spring of 1969, when by a fortuitous conjunction of political stars, the National Environmental Policy Act (NEPA) was moving towards passage by the United States Congress, the concept of the Environmental Impact Statement (EIS) was a late introduction in the draft legislation. After NEPA was passed, the EIS quickly became the main feature of the legislation in the public mind. And, as part of the EIS package, proponents of a project were generally required to demonstrate whether it would be a net benefit to the public domain. This was to be demonstrated by a Cost/Benefit Analysis showing a net balance of public benefit after recognizing environmental costs.

The EIS process, with its compendious analyses, was later described by one of the architects of NEPA as "a boondoggle for under-employed ecologists".

To be entirely accurate, the first generation EIS and its cost/benefit analysis were more the product of economists than ecologists. The underlying economic assumption was that the components of the biosphere which did not have an established economic value should not be reckoned. Potable water or irrigation water would be given a value, but the capacity of a lake or river to absorb effluents would not. A good analogy might be a corporate profit and loss statement without entries for depreciation or depletion.

And to be entirely fair, early ecologists did not gain the necessary clout to demand a full accounting until 1987, when Gro Harlem Brundtland made popular the principle of sustainable development. The new ecological accounting necessary to determine sustainability, which might be called "ecounting", measures the impact of proposed development relative to the carrying capacity of the ecosystem. If the impact of the development is sustainable, then its productivity can be reckoned as a net benefit (profit) to the nation.

Ecological accounting and corporate accounting are therefore poles apart. An adequate sustainability assessment tells us everything we can know about biospheric impact. Corporate accounting tells us nothing about biospheric impact. Sustainable productivity is the legitimate concern of a modern environmental assessment process. Corporate profit should be the exclusive territory of the private sector.

How to fix the process:

When looking at the available options to fix our environmental assessment process, the good news is that the

environmental regulators and panellists are not required by law to make decisions about the market, about technology, and about profitability. The regulators do it because they want to, and the panellists do it because they are told to.

In legal terminology, the federal minister of environment, and most provincial ministers of environment, are not mandated by their governing statutes to make these private sector decisions. The ministers must exercise their discretionary powers to have need, technology and profitability added to terms of reference and guidelines for the private sector proposals.

In practice, the minister's discretion is of course exercised on the advice of the departmental administrators. But if the ministers are persuaded that their ministries should stop wasting their time and the public's money second-guessing the private sector, they can put a stop to it by policy direction, without having to amend their governing statutes.

The bad news is that this persuasion is unlikely to come from entrepreneurs who have proposals under assessment. These people are understandably beholden to the regulators, part of whose job it is to advise applicants for environmental licence on how the process works, and how to get through it. Any executive wise in the ways of the world hesitates to object to a need and justification or technology guideline requirement because of the risk of offending regulators who are not only the executive's advisors but also advisors to the minister, and may well be the chief witnesses at any public hearings.

The more likely agents for change in the environmental assessment process are the federal and provincial ministers responsible for industrial development. It is now not unusual for environmental licences in new technology fields to take more time from application to licence to construct than will be required for construction of the plant itself. Entrepreneurs, having been met with welcoming arms by the Department of Industry people, visit with the Department of Environment and discover that when these two time periods are added together, the first product from the proposed plant is several years away. They often have second thoughts about beginning the process, or having begun, give up before the end. The new plant that the Industry Minister was counting on has to be struck off the list.

Whether this discouragement of new industry gets the attention of the development side of government, or whether the growing discontent in business circles finds political expression, the hoped for result is that the federal and provincial ministers of environment are persuaded to cure the environmental assessment process.

A suggested cure:
The cure might be effected by a policy direction along the following lines:

1. ***All biospheric outputs by industry will be strictly controlled by setting maximum limits, monitoring the outputs, and suspending or cancelling licences if those limits are exceeded.***

2. ***No private sector applicant for licence will be required to prove that there is a market for the proposed product or service, or that there is a need or justification for the proposed development.***

3. ***The technology to be employed by private sector applicants will not be regulated for the purpose of controlling biospheric outputs. Output limits will be specified as conditions of licence, and monitored for conformance at startup and as appropriate during operations.***

4. ***The sustainability of the ecological impacts of a development can be assessed, but the proponent's profitability will not be considered.***

The departmental resources freed up when administrators are relieved of their perceived responsibility to review markets, technology and profitability, can then be concentrated on assessing the carrying capacity of our ecosystems, refining standards for emissions, effluents and soil contaminants, and developing monitoring systems which ensure that these standards are met.

In short, our departments of environment can concentrate their resources on assessing and ensuring the sustainability of development.

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Notes:

1. The Environmental Management Framework Agreement, with the comfortable acronym EMF, is the subject of an insightful analysis by Steven A. Kennett, a Research Associate with the Canadian Institute of Resources Law at Calgary, published in the Fall 1995 Newsletter of the Institute.

2. Reports of public reviews by Panels under the EARP Guidelines as extracted by Rodney Northey in his 1995 Annotated Canadian Environmental Assessment Act, Carswell (Northey), p.284, PANEL 4 at 30.

3. Northey, p. 285, PANEL 37 at 29-30.

4. Northey, p. 467, PANEL 38 at 33.

5. Ibid.

6. Northey, p. 286, PANEL 46 at 39.

Recent Developments in Canadian Oil and Gas Law

by Nigel Bankes*

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Operating agreement - Supplementary AFE - Liability of operator to joint operators - Oilfield practices

M entered into a participation agreement (PA) with P and C. The agreement incorporated the CAPL Operating Procedure 1981. As part of finalizing the PA, M prepared an AFE for $2.1 million for the drilling of a deep well in the foothills area of British Columbia, an area known to be one of the most challenging drilling environments in the world. The well was plagued by numerous problems including shale sloughing, loss of circulation, gas blows etc. and was eventually abandoned prior to reaching target depth. When sloughing problems first arose C wrote M accusing M of gross negligence in its conduct of the operation and insisting upon the abandonment of the well. The final estimated costs of the well was $3.2 million. P and C refused to pay any more than their respective shares of the original AFE. M did provide P and C with a supplementary AFE but by that time the original costs had already been substantially exceeded. Neither P nor C ever executed the supplementary AFE. M sued P and C for the difference between the original AFE and the final costs and P and C counterclaimed for losses that they suffered as a result of the negligence of M in the preparation of the AFE and in the execution of the drilling program.

Although there were some interpretive issues surrounding the incorporation of the AFE clauses of the CAPL within the PA, the primary issue before the court was the interpretation of cl.301 of CAPL 1981 and the need for a supplementary AFE. The 1981 iteration of the CAPL form, unlike either the 1974 or 1990 versions, contains a clause providing that where an operator incurs or expects to incur expenditures in excess of the original AFE plus 10% "it shall forthwith so advise the Joint Operators and submit for their approval a written supplementary [AFE] for such expenditures." In an earlier trial-level decision Justice Sulatycky in *Novalta v. Ortynsky* (1994), 18 Alta. L.R.(3d) 4 (QB) had reached the remarkable conclusion that the AFE provisions of CAPL 1981 applied to all operations on the joint lands *except* operations for the drilling and casing of a well, and, as a consequence, he did not need to deal with the effect of a failure to obtain a supplementary AFE in that case.

In the present case, the court decided that a supplementary AFE was a mandatory requirement under CAPL 1981 and that in the absence thereof, P and C could not be liable for the cost overruns. This conclusion stands in marked contrast to an earlier decision of the Alberta Court of Appeal in *Renaissance Resources Ltd. Metalore* Resources *Ltd* [1985] 4 WWR 673, on the 1974 CAPL to the effect that consent to an operation is a commitment to pay even if there are cost overruns. Although this decision was qualified by later decisions holding that a joint operator would not be liable in the event that an operator carried out an operation that was different from that described in the AFE, (*Prairie Pacific Energy Corp v. Scurry Rainbow Oil Ltd* (1994), 52 CPR 289 (Alta. Q.B.) *Passburg Petroleums v. San Antonio Explorations Ltd* [1988] 2 WWR 645 (Alta. QB)) or where there was a breach of a fiduciary duty, (*Erehwon Exploration Ltd. v. Nothstar Energy Corp* (1993), 15 Alta.L.R.(3d) 200 (Q.B., appeal (relating to other matters) dismissed by the Alberta Court of Appeal, April 17, 1997) the present decision is the first decision to hold, on the basis of the 1981 CAPL, that execution of a supplementary AFE is essential to liability for cost overruns.

Although there was evidence that the AFE was negligently prepared, the court held that P and C were estopped from making that contention since they scrutinized the AFE as part of the process leading up to the execution of the PA. Nevertheless, the court also held that an operator might, in principle, be liable to joint operators for its own negligence notwithstanding clause 401 which appears to indicate that an operator is liable only for losses caused by its own gross negligence or wilful misconduct. That clause, said the court and consistent with earlier authority (*Erehwon*), is limited to the situation in which a third party suffers loss as a result of the negligence of the operator.

The court also held that M was negligent in its conduct of the drilling operations. Negligent conduct included failing to follow the advice of geologists experienced in the area; failing to use a polymer based mud instead of the water-based mud that had been used when drilling through the shales that it was known would be encountered in this area; and, failing to consult drilling records for offsetting wells.

Morrison Petroleums Ltd. v. Phoenix Oil Company Limited and Richard J. Churchill Ltd [1996] AJ No. 275 (QL Systems)

Petroleum and natural gas lease - Third proviso - Secondary term - Failure to produce and market - Lease terminated

The third proviso in each of two leases stated that a lease might be continued beyond the end of a the primary term where a well was "shut in, suspended or otherwise not produced as a result of a lack of, or an intermittent market, or lack of transportation facilities or any cause whatsoever beyond the lessee's reasonable control." Wells had been drilled on the properties and shut in royalties had been paid for a number of years, but there had been no production. The Alberta Court of Queen's Bench held that both leases had expired no later than 1987 when both transportation and a market were available for any natural gas which could have been produced from the wells. The court held that the lessee had an onus to prove that they fell within the proviso and they were unable to do so. In particular, although there was some evidence that they had encountered difficulties obtaining access to pipelining and processing facilities, there was no evidence that they had exhausted all the commercial possibilities or that they had exhausted all regulatory options available to them including an application to the Energy and Utilities Board for a common carrier order.

54967 Alberta Ltd. and 562703 Alberta Inc. v. Teg Holdings, Telstar Resources Ltd. and Bank of Montreal, [1997] AJ No. 321 (QL Systems)

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

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