Resources

No. 67 Summer 1999

The Newsletter of the Canadian Institute of Resources Law

The Pit and the Pendulum – The Search for Consistency in the Law Governing Environmental Assessment

*by Richard Neufeld**

Two recent decisions of the Federal Court of Canada will have important ramifications for environmentally contentious projects under federal jurisdiction. Each case involves interpretation of the nature and extent of the legal duties imposed on federal authorities under the *Canadian Environmental Assessment Act*[1] ("CEAA"). Each displays a markedly different approach to the judicial review of decisions made under that statute. Both illustrate some of the difficulties faced by environmental law practitioners in predicting how decisions made by regulatory agencies or tribunals may subsequently be treated by the Courts in the maelstrom of judicial review litigation.

The Pit – The Federal Court Trial Division in the Cheviot Mine Case[2]

In 1994, Cardinal River Coal Ltd. announced plans to develop a coal mine near Hinton, Alberta. The "Cheviot" mine would be located to the east of the Jasper National Park. At its peak, the mine would employ over 450 people, with a target annual production of 3 million tonnes of clean coal. The coal would be used primarily for export.

Development of the open pit mine would necessitate a number of landscape changes, including the diversion of certain streams and the disturbance of terrestrial habitat for valued wildlife species. As might be expected, the proposal therefore drew interest and, in the end result, vigorous opposition from a number of environmental groups.

The Provincial Regulatory Process

From the provincial perspective, the Cheviot mine proposal triggered a requirement for an environmental impact assessment under the *Alberta Environmental Protection and Enhancement Act*.[3] It also required, *inter alia*, approval of the Alberta Energy and Utilities Board (the "EUB") under the *Coal Conservation Act*[4] ("CCA"). Proceedings before the EUB are, in turn, governed by the provisions of the *Energy Resources Conservation Act*[5] and the *Administrative Procedures Act*,[6] both of which codify and entrench the right of participants at EUB proceedings to procedural fairness.

The Federal Regulatory Process

Federal regulation of mining operations, *per se*, does not exist. However, if such a project involves an activity that requires a federal approval listed in section 5 of the CEAA, an environmental assessment is required prior to the approval being issued.

In the case of the Cheviot mine, the diversion and filling in of fish-bearing streams flowing through the prospective mining area was an activity for which approval was required under the *Fisheries Act*.[7] Such approvals trigger the operation of the CEAA. Section 21 of the CEAA allows a Responsible Authority ("RA") one of two choices when a project of this nature is proposed. It must either ensure that a comprehensive study report ("CSR") is undertaken, or it must refer the project to the Minister of the Environment for appointment of a review panel, in accordance with section 29.

Although the project proponent may have prepared its own environmental assessment in advance of the public hearing processes under the CEAA or other federal legislation, it is the CSR or review panel report itself that is considered by the Governor in Council when deciding on a course of action under the CEAA.[8]

Résumé

Deux décisions récentes de la Cour fédérale du Canada dénotent une approche totalement différente à l'égard du contrôle judiciaire des décisions prises par des organismes gouvernementaux en vertu de la Loi canadienne sur l'évaluation environnementale (la LCEE). Dans le premier cas, relatif à la mine de charbon Cheviot située près de Hinton, en Alberta, la section de première instance de la Cour fédérale a conclu qu'un rapport approfondi de la commission conjointe préparé au terme d'un processus prolongé d'audiences publiques n'était pas valide. La Cour a interprété la LCEE comme imposant aux commissions d'évaluation une obligation "rigoureuse" d'obtenir des renseignements et a conclu que, lorsque les éléments de preuve sur lesquels la commission conjointe s'est appuyée ne sont pas aussi complets qu'ils auraient pu l'être, une erreur de droit a été commise. Le deuxième cas est un appel interjeté à la Cour d'appel fédérale contre une décision de la section de première instance concluant qu'un rapport d'étude approfondie préparé en vertu de la LCEE n'était pas conforme aux dispositions de cette loi. Bien que la Cour d'appel ait confirmé la décision de la section de première instance, elle l'a fait de façon beaucoup plus limitée. La Cour a souligné que le pouvoir de déterminer la portée d'un projet et la portée d'une évaluation environnementale conferré par les articles 15 et 16 de la LCEE comporte l'exercice d'un pouvoir discrétionnaire. La Cour ne devrait entraver l'exercice de cette discrétion que lorsqu'une erreur de droit ou de juridiction a été commise.

La différence fondamentale entre ces deux décisions est la mesure dans laquelle la Cour était prête à se déférer aux décisions prises par l'organisme gouvernemental ou le tribunal en question. La décision dans la cause Sunpine dénotait une bien plus grande déférence judiciaire, et faisant suite à des décisions antérieures semblables, à savoir les causes Tolko et Voisey's Bay, pourrait indiquer une tendance vers la non-ingérence eu égard aux décisions prises par les autorités responsables ou les commissions d'évaluation en vertu de la LCEE.

It is only after this process has been completed, and a positive response has been given by the Minister, that an RA can issue project approval. In Cheviot, the Department of Fisheries and Oceans initially determined that the mine would be dealt with as a "Comprehensive Study Report" project. It was ultimately determined, however, that public concern warranted a review panel process. The project was therefore referred to the Minister for that purpose. Because the EUB was to conduct a public hearing into the project anyway, the logical decision was made to negotiate Terms of Reference for a Joint Review Panel process under the CEAA, so that only one hearing would be held.

The Hearing and Decision

Following a protracted public hearing process, the Joint Review Panel issued a report recommending approval of the Cheviot project.[9] The key findings in the 150 page decision were:

- The Applicant had established a contractual right and economic need for the mine.
- The Applicant had adequately considered alternative methods of mining, and surface mining was the optimal method.
- The Project will result in short-term disruption and permanent loss of fish habitat, which must be minimized, but the proposals to compensate for lost habitat were reasonable.
- The Project will cause significant terrestrial impacts, but those impacts can be justified and reduced as mine planning continues.
- The Project will have unacceptable impacts on certain limited areas and, as such, no mining will be allowed in those areas.
- The Project is consistent with provincial land use policy and will provide significant economic and social benefits.

In arriving at this decision, the Joint Review Panel relied on the evidence presented to it during the hearing. Given the fact that the panel was operating in a quasi-judicial capacity, and subject to the strictures of both the common law and the Alberta *Administrative Procedures Act*,[10] it was hardly surprising that the panel would comport itself in that manner. The panel's report adopted an established format of identifying the issues before it for determination; summarizing the views of the parties in respect of those issues; and articulating the views of the panel having consideration to the evidence and arguments before it.

The Judicial Review Process

The decision of the Joint Review Panel was released to the public on June 17, 1997. Under the provisions of the *Energy Resources Conservation Act*, parties aggrieved with that decision had 30 days to obtain leave to appeal from the Alberta Court of Appeal on a question of law or jurisdiction.[11] No one sought leave to appeal, and the time for challenging the decision under the Alberta environmental assessment/regulatory regime therefore lapsed.

An application for judicial review of the Joint Review Panel report was, however, initiated in the Trial Division of the Federal Court of Canada by the Alberta Wilderness Association and others in respect of its compliance with federal requirements. Initially, the application was dismissed on the basis that the Joint Panel Report was not, in itself, subject to judicial review, at least in the absence of a challenge to the federal Minister's response to the report.[12] That decision was overturned by the Federal Court of Appeal, which held that the adequacy of the Joint Review Panel Report under the CEAA could be assessed on judicial review, and that this was best done by remitting the matter back to the Trial Division. The hearing of the application as directed by the Court of Appeal took place before Mr. Justice Campbell of the Trial Division.[13]

Mr. Justice Campbell found that the Joint Review Panel Report was defective in a number of respects. In particular, he found that the Panel's report failed to meet the minimum standards required under section 16 of the CEAA pertaining to the scope of environmental assessment. Section 16 provides:

16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;
(b) the significance of the effects referred to in paragraph (a);
(c) comments from the public that are received in accordance with this Act and the regulations;
(d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and
(e) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.

(2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(a) the purpose of the project;
(b) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;
(c) the need for, and the requirements of, any follow-up program in respect of the project; and
(d) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

The question of whether the reasoning of the Court in finding the Joint Review Panel Report to be defective was supportable in law is beyond the scope of this article. So, too, are its potential effects on the ability of future Joint Review Panels to fulfil their obligation under the CEAA while still adhering to the principles of procedural fairness. What is important, for the purposes of this discussion, is the apparent ease with which the Court overturned findings of fact or conclusions on the evidence, by characterizing them as questions of law.[14] For example, the Court found that the Joint Review Panel had committed the following errors:

- failure to gather sufficient information in respect of future forestry activities in the area;
- misinterpretation of evidence concerning removal of ungulate habitat;
- failure to compel production of information concerning other mine proposals in the area;
- failure to compel a comparative analysis between open pit and underground mining.

For the most part, these determinations were characterized as errors of law by virtue of an earlier finding that, as a matter of law, the Joint Review Panel had an "onerous" information gathering duty which transcended even its duty to determine whether the project was in the public interest under the CCA.[15] It followed, therefore, that in any instance where the Joint Review Panel reached a conclusion without calling for additional evidence that, in the Court's view, was necessary to fully report to the Minister, an error of law had been committed.

In the result, the Court remitted the matter back to the Joint Review Panel for the purpose of completing a new report that would satisfy the requirements of the CEAA. The Panel has now reconvened.

The Pendulum – The Federal Court of Appeal Decision in the Sunpine Forest Products Case

While hailed in the media as a victory for the environmental movement, the recent Federal Court of Appeal in Sunpine in fact substantially limited the scope of judicial review over decisions taken by RA's under the CEAA. Given that the primary priority of a project proponent is ordinarily certainty of process, the Court of Appeal's decision was, in many respects, a major victory for industry and those in support of economic development.

The facts in Sunpine are relatively straightforward.

In December 1995, Sunpine Forest Products Ltd. applied for approvals to construct two bridges over navigable waters pursuant to subsection 5(1) of the *Navigable Waters Protection Act*[16] ("NWPA"). The two bridges were integral elements of the Mainline Road connecting Sunpine's forest management area with its plant.

The applications for approvals were submitted to the Canadian Coast Guard and triggered an environmental assessment under the CEAA. The Minister of Fisheries and Oceans (the "Fisheries Minister") became the RA under the CEAA, on the basis that responsibility for the Coast Guard had been transferred from the Minister of Transport to the Fisheries Minister under the *Public Service Rearrangement and Transfer of Duties Act*.[17]

As RA, the Fisheries Minister determined that the bridges constituted two separate "projects" within the meaning of the CEAA, and conducted two separate, though very similar, environmental assessments of the bridges. The environmental assessments took the form of "screening reports" pursuant to section 18 of the CEAA.

The scopes of the two projects were set in essentially identical terms:

> The scope of the Ram River Bridge project includes: the construction and maintenance of a two lane dual span bridge [later modified to a single span bridge] over the Ram River, including associated approaches and related works, storage areas or other undertakings directly associated with the construction site, construction of a centre pier [later deleted], abutments and the bridge structure.

Thus, the scope of the two projects did not include either the Mainline Road or the forestry operations of Sunpine. As a consequence, the two screening reports did not contain an assessment of the environmental impacts of the road and the forestry operations. An assessment of those activities had, however, been performed as part of the provincial approval process.

The conclusions of the two screening reports were that the bridge projects (as scoped) would not have any significant environmental effects. Approvals for the two bridges were accordingly granted under the NWPA, on behalf of the Fisheries Minister ("DFO").

As was the case in Cheviot, the provincial approval process was not challenged. However, an application for judicial review was made to the Federal Court of Canada, attacking the authorization issued by the federal government. At the Trial Division, Justice Gibson held that the DFO had made two basic errors in issuing the screening reports.[18] These were:

1. The DFO had improperly excluded related "upstream" projects, such as a connected forestry access road, from the scope of the project to be assessed, pursuant to subsection 15(3) of the CEAA.

2. The DFO had failed to consider the cumulative effects of the bridge project(s) in combination with the effects of the Mainline Road, contrary to section 16 of the CEAA.

In the course of making these determinations, Mr. Justice Gibson made a number of ancillary findings that generated comment in environmental assessment circles. First, he found that the decision of the RA was reviewable on a standard of correctness, except where the RA was exercising a discretionary power. Second, His Lordship introduced the "independent utility" test developed by some American courts to test whether, as a matter of law, different activities being undertaken by the same developer were required to be included in the same environmental assessment.[19] Third, he found that the fact that upstream projects (or project elements) had already been examined as part of provincial environmental assessment processes was irrelevant to the issue of whether they must also be assessed under the CEAA. Finally, he found that a failure to consider the cumulative effects of known, upstream projects was a contravention of section 16 of the CEAA (which prescribes the factors to be included in the scope of environmental assessment issued by an RA).

On appeal to the Federal Court of Appeal, a number of these findings were overruled.

While agreeing that the standard to be employed in the judicial review of decisions by RA's was, in respect of questions of law, one of correctness, the Court of Appeal showed deference to the RA by recognizing the amount of discretion conferred on RA's under the CEAA in the performance of environmental assessments. The Court of Appeal was much more prepared, it seemed, to acknowledge that the purpose of "scoping" - whether undertaken in relation to defining the scope of the project pursuant to section 15, or in relation to determining the scope of environmental assessment itself - is to improve environmental assessment. Excluding activities that need not be part of a project assessment, or by narrowing down the scope of the factors to be assessed, allows an assessor to focus on that which is important, and discard that which is not.

The supportive approach of the Court of Appeal was manifested in a number of findings.

While adopting the same standard of review as that used by Justice Gibson, the Court of Appeal took a more expansive view of the discretion held by RA's and, conversely, a narrower view of what would constitute a decision reviewable on a standard of correctness. The Court confirmed Justice Gibson's finding that the decision to scope the projects so as to include only the bridges was a proper exercise of discretion under subsection 15(1). It went further than that, however, and held that the exercise of discretion was not overridden by subsection 15(3). That subsection was interpreted to refer only to physical works undertaken in relation to the project as scoped, rather than those undertaken separately from the project.[20]

The recognition of the "power to scope" carried over into the Court's discussion of section 16 of the CEAA. The decision of Justice Gibson on this point was, essentially, that the RA was required, as a matter of law, to include all projects of which it was aware in the consideration of cumulative effects of the project. The Court of Appeal disagreed. It held that an RA must not misinstruct itself in the law by refusing to consider the environmental impacts of provincially-regulated activities solely on the basis of constitutional jurisdiction,[21] but, in the absence of such an error, the RA was entitled to apply its own judgement as to activities that should be included in the consideration of cumulative effects:

> Having said this, I emphasize that it is within the discretion of the responsible authority to determine the scope of factors to be taken into consideration pursuant to paragraph 16(1)(a). Provided the responsible authority does not decline to exercise its discretion by misinterpreting paragraph 16(1)(a) and subsection 16(3), it is open to it to include or exclude other projects - in this case, the Mainline Road or forestry operations as it considers appropriate.

The Court of Appeal also made it clear that where a provincial environmental assessment has been done, the federal agency performing the duty of RA is entitled to refer to and rely on that assessment. Mr. Justice Rothstein stated:

> The Province of Alberta conducted certain environmental assessments. I see no reason why it would not be open to the Coast Guard to have regard for the work done by the Province of Alberta in its cumulative effects assessment under paragraph 16(1)(a). I do not read paragraph 16(1)(a) or the discretion to be exercised under subsection 16(3) as inviting or requiring duplication of environmental assessments.

It is apparent, therefore, that while the Court of Appeal decision upheld that of the Trial Division, it had a much different view of the role to be played by the Courts in reviewing decisions made by federal RA's than did the lower Court.

Conclusion

The obvious, but moot, question that arises, is whether, in light of the Sunpine case, the decision of the Trial Division in Cheviot could have withstood an appeal. It is suggested that it could not.

While the legal issues were different in each of these cases, the underlying question was the same. That is, under what circumstances should the court substitute its view on the adequacy of a comprehensive study or review panel report for those of the RA or review panel? In Cheviot, the Trial Division appeared to be prepared to do so whenever any of the conclusions of the panel left any room for uncertainty. In Sunpine, the Court of Appeal restricted its review to questions that can easily and properly be considered to be ones of law or jurisdiction. In doing so, the Court of Appeal, following similar decisions of the Trial Division in the *Tolko* and *Voisey's Bay* cases, appears to have solidified a trend for deference to decisions made in the scoping and preparation of environmental assessments.

Time will tell whether the pendulum has completed its swing, but the movement has clearly begun.

Richard Neufeld is a Partner at the Calgary law firm Fraser Milner.

Notes

1. S.C. 1992, c. 37.

2. *Alberta Wilderness Assn.* v. *Cardinal River Coals Ltd.* [1999] F.C.J. No. 441, D.R.S. 99-06130, Court File No. T-1790-98.

3. S.A. 1992, c. E-13.3.

4. R.S.A. 1980, c. C-14.

5. R.S.A. 1980, c. E-11.

6. R.S.A. 1980, c. A-2.

7. R.S.C. 1985, c. F-14.

8. Section 37.

9. EUB Decision Report 97-08.

10. R.S.A. 1980, c. A-2.

11. Section 44.

12. *Alberta Wilderness Assn.* v. *Canada (Minister of Fisheries and Oceans)* [1998] F.C.J. No. 821, Court File No. T-2354-97 (Fed. Ct. T.D.) McKeown, J.

13. *Alberta Wilderness Assn.* v. *Canada (Minister of Fisheries and Oceans)* [1998] F.C.J. No. 1746, Court file No. A-430-98 (Fed. C.A.) Strayer, Robertson and Sexton, JJ.

14. In fairness, Mr. Justice Campbell was clearly guided by the tenor of the decision of the Court of Appeal in its decision remitting the matter back to the Trial Division for determination. One can reasonably infer that the Court of Appeal intended that the issue of the review panel report's compliance with the CEAA be reconsidered, as a question of law, with reference to the evidentiary record. Whether it intended that the Trial Division substitute its views on the sufficiency of evidence or the conclusions to be drawn from the evidence is open to doubt, however, in view of the subsequent *Sunpine* decision, to be discussed later in this article.

15. From the perspectives of consistency and predictability of process, this aspect of the decision is quite troubling. Canadian administrative tribunals commonly fulfil both an advisory and decision-making function. To hold that the former transcends the latter is to potentially force quasi-judicial tribunals to cast aside their adjudicatory role in favour of becoming an aggressive participant in the formulation of evidence – something which agencies such as the EUB are loathe to do, given their own enabling statutes and standards of fairness, and which the Courts have refused to countenance (see, for example, *Rozander* v. *The Energy Resources Conservation Board* (1978) 93 D.L.R. (3d) 271 (Alta. C.A.) leave to appeal to S.C.C. refused 26 N.R. 265, and *Murray* v. *The Municipal District of Rocky View No. 44* (1980) 110 D.L.R. (3d) 641 (Alta. C.A.) It will, at minimum, require that the Terms of Reference for future Joint Review Panels be very carefully worded so as to recognize the dual functions, and the constraints under which the tribunal must operate.

16. R.S.C. 1985, c. N-22.

17. R.S.C. 1985, c. P-34.

18. Unlike the Cheviot mine, bridges such as those proposed did not qualify as "comprehensive study" report projects under the CEAA. Consequently, only a "screening report" was required.

19. I.e., if the two activities would have no practical use in the absence of each other, then they are "related" and must be included in the project scope.

20. This aspect of the decision was consistent with the decisions of Justice Nadon in Manitoba's *Future Forest Alliance* v. *Canada (Minister of the Environment)* [1999] F.C.J. No. 903 (Fed. Ct. T.D.), (the "Tolko" case) and the decision of Justice MacKay in *Citizens Mining Council of Newfoundland and Labrador Inc.* v. *Canada* [1999] F.C.J. No. 273 (Fed. Ct., T.D.) (the "Voiseys' Bay" case), both of which conflicted in a number of respects with Sunpine.

21. This finding was clearly correct in law, given the Supreme Court of Canada decision in the *Friends of the Oldman River* v. *Canada* [1992] 1 S.C.R. 3. Moreover, a jurisdictional error of this nature is a classic example of one that is reviewable by the Courts [see, for example, *Bell* v. *Ont. Human Rights Commission* [1971] S.C.R. 756, for an example of jurisdictional error in the pre-Nicholson era of administrative law].

Recent Developments in Canadian Oil and Gas Law

*by Nigel Bankes**

A reserves dedication in a gas purchase contract does not amount to an interest in land

The Alberta Court of Queen's Bench has now confirmed that a reserves dedication in a gas sales contract generally will not amount to an interest in land so as to bind the purchaser of the producing properties, regardless of notice. A purchaser of the producing property will only be bound to honour the terms of the contract to the extent that it enters into a personal covenant with the gas purchaser through a novation or other means. The court has not quite closed the door on all possible future arguments because it did observe that "there is nothing in our law which would prevent the parties if they so desired" from giving proprietary effect to a dedication agreement. Evidently, to meet this test, the court would need to see some language charging the dedicated properties as security in the event of failure to deliver or alternatively perhaps providing for a right of re-entry in the event of breach.

Blue Range had obtained an order from the court under the terms of the *Companies' Creditors Arrangement Act* (CCAA). The order, *inter alia*, precluded other parties from exercising rights of set-off against Blue Range without the approval of the court and authorized Blue Range to terminate such of its contractual arrangements as seemed appropriate to allow Blue Range to proceed with an orderly re-structuring. Relying on the order, Blue Range gave notice purporting to terminate gas supply contracts with the applicants and offered its producing properties for sale free and clear of these gas supply contracts which included clauses dedicating particular lands to meet contract commitments as well as contract prices that were lower than current spot prices.

The applicants in *Re Blue Range Resource Corp.* (1999) A.J. 788 (QB) sought orders declaring: (1) that Blue Range's properties were subject to the pricing and dedication provisions of the gas supply contracts, (2) that Blue Range could only terminate contracts if it were incapable of performing them or if it could establish that the termination were essential to the success of its restructuring, and (3) that the applicants could set-off monies owing by them for gas delivered to them by Blue R ange prior to termination, against Blue Range's liability in damages for breach of contract.

The applicants failed on all grounds. In addition to (1) (dealt with above), the court confirmed (under (2)) the broad scope of orders under the CCAA observing that the applicants were not entitled to the equivalent of injunctive relief to prevent Blue Range terminating its contractual obligations. The applicants' remedy sounded in damages only and they were entitled to no particular security for their claim. Neither, (3) could the applicants assert legal or equitable set-off against Blue Range. Legal set-off was not available since the applicants' claim was not an unliquidated claim. Equitable set-off was not available since the applicants had already incurred an obligation to pay for delivered gas before Blue Range terminated the contracts. There was therefore no manifest injustice arising from denying set-off.

The parties agreed to adjourn the question of whether or not the gas contracts might be an "eligible financial contract" within the meaning of section 11.1 of the CCAA (see the next case).

None of the parties seem to have argued that a dedication of reserves, if not an interest in land, might amount to a negative covenant that would bind a subsequent purchaser of the encumbered leases in equity. This seems correct for in Canadian law the arrangement lacks the necessary prerequisites to make such a covenant run. There could be no dominant and servient tenement; a reserves dedication is a promise in gross.

In an application for leave to appeal to the Court of Appeal, Justice Fruman (1999) AJ 975 declined to grant leave on issue (2) above but granted leave on the set-off issue (issue 3).

Gas sales contracts are not "eligible financial contracts" for the purposes of the CCAA

Under the Blue Range CCAA Order, holders of "eligible financial contracts" were, in accordance with the scheme of the Act expressly permitted to terminate their contracts in accordance with the terms of the arrangements and claiming a right of set-off. Section 11.1 of the CCAA provides a list of "eligible financial contracts". The section adopts the terminology of the financial sector without offering more detailed lay definitions. Ruling out certain categories on the list, was a gas sales contract of the type before the court a "... future, forward or other commodity contract" or a master agreement in respect of the same?

The court in *Re Blue Range Resource Corp.* (1999) A.J. 830 (QB) found that the CCAA provision, based as it was on the similar provisions in the US Bankruptcy Code, was intended to cover financial risk management arrangements and not simply contracts for the sale of a commodity over a period of time. Were these contracts 'physical' or 'financial' transactions? In the case of a physical contract, the parties actually anticipate an actual trade in the commodity even though the pricing provisions of the contract (fixed or spot) might actually provide the vendor with a hedge against future volatility. In the case of financial transactions based upon, for example, swap

arrangements, the parties contemplate no actual deliveries but only net payments.

In the present case, the parties clearly contemplated actually delivery of gas. Thus, notwithstanding the fact that one of the parties, Enron, also had contracts with Blue Range that were in the standard form of the International Swap Dealers Association (ISDA) and as such were clearly eligible contracts, and notwithstanding similarities between the ISDA agreements and the master gas sales agreement, especially with respect 'defaults and remedies', the subject contracts were not "eligible financial contracts". The Alberta Court of Appeal has granted leave to appeal on this issue: (1999) A.J. 975 at para. 14.

Court rejects collateral attack on utility board decision interpreting gas supply contracts with brokers

The applicant brokers purchased gas for Manitoba customers residing in the distribution area of Centra Gas. The Manitoba Board regulated direct sales agreements in Manitoba by requiring a standard form buy-sell arrangement between brokers acting on behalf of direct sales customers and the utility, Centra Gas. When the Board disallowed Centra Gas' attempt to pass on to its customers costs incurred by its participating in hedging arrangements to stabilize its gas price, Centra attempted to share a portion of these costs with the applicant brokers based upon its interpretation of the buy-sell arrangement. The buy-sell arrangements with the brokers adopted a monthly reference price (MRP) that was based upon Centra's monthly weighted average cost of gas. Centra argued, in effect, that it had overpaid the brokers under the terms of the buy-sell arrangements. Its calculated cost of gas had been overstated as a result of wrongly including all its stabilization costs in the MRP and it now sought a refund.

The brokers initially took the issue to the Board but when the Board agreed with Centra, the brokers, instead of exercising a statutory right of appeal to the Manitoba Court of Appeal, brought this application in the Court of Queen's Bench seeking a declaration as to the proper interpretation of the buy-sell contracts.

The court rejected that application in *Direct Energy Marketing Ltd.* v. *Centra Gas Manitoba Inc.* (1999) M.J. 274 (QB) recognizing that the brokers were seeking exactly the same relief that they had already sought from the Board. The Board was protected by a privative clause and the collateral attack was impermissible. The Court noted that had the brokers first commenced an application in superior court, the Court might have hesitated to assume jurisdiction given that the legislature had conferred upon the Board supervisory jurisdiction over the utility. But certainly, once having gone to the Board, it was too late to take the same issue to the court other than by way of statutory appeal from the decision of the Board.

Oil and gas operator liable in negligence and nuisance for damages incurred by rancher. Operator has a duty to prevent access by cattle.

Mobil owed a duty of care to the surface owner in respect of oil and gas operations on the owner's lands. Mobil breached that duty when Jones' cattle were able to ingest contamination at a well site. The well site was fenced in accordance with normal industry practice but this standard was inadequate given that Mobil was aware of the fact that fencing did not prevent access and at other sites had adopted more secure fencing practices at a reasonable cost. Mobil had a duty to effectively prevent access by cattle: *Jones* v. *Mobil Oil Canada Ltd.* (1999) A.J. 797 (QB).

Mobil was not liable in negligence for losses suffered from contamination at an flare pit that had been operated and then covered (in 1973) by Mobil's corporate predecessor. Mobil remediated the site once the problem was drawn to its attention in 1990. Although even in 1973 it might have been reasonably foreseeable that disposing of flare pits by covering them with soil might cause contamination to the surrounding soil and groundwater, that was the accepted practice in the industry at the time and there was no breach of the duty of care.

Mobil was however liable in nuisance for damages flowing from the flare pit site. Given that it was Mobil through its corporate predecessor that created the problem, the plaintiff did not need to show that Mobil had adopted the nuisance or was negligent, it merely had to show that Mobil had created the problem. Mobil could escape liability only by showing that it had done all that it reasonably could and all that was practicable. The court supported this strict view of liability (without resorting to *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330) by observing that the natural resource industry is a steward of lands in Alberta and for that reason should bear the burden of the highest standard of care where there is the possibility of injury arising from nuisance. Causation need not be proven with scientific precision and it was sufficient to found liability if the actions or inactions of the defendant caused or materially contributed to the damage suffered by the plaintiff.

More detailed versions of these 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 Law reporter for the Rocky Mountain Mineral Law Foundation Newsletter.*

New Publications

Local Benefits from Mineral Development: The Law Applicable in the Northwest Territories, *by Janet M. Keeping. 1999. 122 pages. ISBN 0-919269-47-8 $35.00 Softcover*

This document reports on the law guaranteeing that local people will benefit from mineral development in the Northwest Territories. It surveys the applicable statute law, as well as the land claims which so far have been settled in both the Northwest Territories and Nunavut. It considers how the fiduciary duty of the Crown to protect indigenous peoples' interests should affect the law on local benefits and contains some observations on the importance of negotiations on devolution of authority from the federal government to the territorial level for the law in this area.

The report points out that there are important legal issues that could not be fully examined by it. One set of these arises from international trade law, and the report briefly discusses how free trade agreements could impact on the law requiring the negotiation of local benefits.

The report also examines directions for improvement of the law in this area through a discussion of several public policy considerations. The report concludes with a recommendation that legislation be enacted to ensure greater consistency and fairness in the guarantee of local benefits in the NWT.

A Guide to Impact and Benefits Agreements, *by Steven A. Kennett. 1999. 120 pages. ISBN 0-919269-48-6. $35.00 Softcover*

The negotiation of impact and benefits agreements (IBAs) has become common practice in Canada when mining developments are located within traditional aboriginal territories or in proximity to remote communities. The increasing prevalence of IBAs has not, however, filling this information gap by reviewing contextual factors relevant to IBAs and providing been matched by the emergence of an extensive descriptive and analytical literature examining these agreements. This paper contributes to an overview of the topics that they commonly address.

Part I of the paper places IBAs in context, beginning with a review of socio-economic considerations. The paper then turns to the legal and policy context for IBAs and the project-specific factors that shape these agreements. Part I concludes with brief comments on the legal nature of IBAs and the role of government in the IBA process.

Part II of the paper examines the contents of IBAs. Beginning with an overview of general trends relating to IBAs, the discussion then turns to the issues addressed in these agreements. The topics covered include employment and training; economic and business development; social, cultural and community support; financial provisions; and environmental protection. The paper concludes by underlining the growing importance of IBAs in Canada and noting the potential of these agreements to meet the needs of aboriginal organizations, mining companies and government.

How to Order

Postage and Handling *Within* Canada:
$2.50 first book, $1.00 each additional book
Postage and Handling *Outside* Canada:
$4.00 first book, $2.00 each additional book
Outside Canada prices are in U.S. dollars.
All Canadian orders are subject to the 7% Goods and Services Tax.

To order publications, please send a numbered, authorized purchase order or a cheque payable to the *University of Calgary*. MasterCard and VISA will also be accepted. Please send orders to: Canadian Institute of Resources Law, MFH 3330, University of Calgary, Calgary, Alberta, Canada T2N 1N4.

Canadian Institute of Resources Law
Institute canadien du droit des ressources
Room 3330 MFH, University of Calgary
Calgary, Alberta, Canada
T2N 1N4

Resources
No. 67 Summer 1999
Resources is the newsletter of the Canadian Institute of Resources Law. Published quarterly, the newsletter's purpose is to provide timely comments on current resources law issues. The opinions presented are those of the authors and do not necessarily reflect the views of the Institute. *Resources* is mailed free of charge to more than 1,500 subscribers throughout the world. (ISSN 0714-5918)
Editor: Nancy Money

Canadian Institute of Resources Law
Executive Director: J. Owen Saunders
Research Associates: John Donihee, Janet Keeping, Steven Kennett, Monique Ross. The Canadian Institute of Resources Law was established in 1979 to undertake research, education, and publication on the law relating to Canada's renewable and non-renewable resources. Funding for the Institute is provided by the Government of Canada, the Alberta Law Foundation, other foundations, and the private sector. Donations to projects and the Resources Law Endowment Fund are tax deductible.

Canadian Institute of Resources Law
Room 3330, MFH, University of Calgary, 2500 University Drive N.W.
Calgary, Alberta T2N 1N4
Telephone: (403) 220-3200
Facsimile: (403) 282-6182
Internet: cirl@ucalgary.ca
WWW site:http://www.ucalgary.ca/~cirl

PRINTED IN CANADA