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Cumulative Effects Assessment and the Cheviot Project: What's Wrong with this Picture?

*by Steven A. Kennett**

Introduction

Cumulative effects assessment (CEA) is an attempt to combine integrated resource management and project-specific environmental assessment (EA) in the service of sustainable development. The idea is undeniably a good one. The results achieved to date, however, are less than satisfactory. There is increasing evidence that CEA is placing unacceptable strains on the EA process, while at the same time failing to deliver the anticipated improvements in environmental and resource management.

This paradoxical and unfortunate situation is clearly illustrated by the EA panel report[1] and subsequent court decision[2] on the application by Cardinal River Coals Ltd. (CRC) for a major coal mining development in the Rocky Mountains of west-central Alberta. The Cheviot project has become a lightening rod for concerns regarding the practical implications of legal requirements for CEA, the role of the courts in enforcing these requirements,[3] and the respective responsibilities of project proponents, review panels and government to address cumulative effects.

The Cheviot process highlights particularly well the difficulties faced by project proponents and review panels as they attempt to reconcile their legal obligations to undertake CEA with the particular characteristics and limitations of EA as currently practised in Canada. The joint federal-provincial review of the Cheviot application was project-specific, reactive and proponent-driven. Government agencies responsible for land and resource management played relatively minor supporting roles as interveners in that process. While this model may work well for narrowly-defined project review, it fits poorly with the demands of integrated resource management that are implicit in CEA. The result was to compromise in several respects the ability of the Cheviot process to address cumulative effects in a satisfactory manner.

This paper argues that the principal deficiencies of the Cheviot process can be traced to a failure by government, as the entity responsible for managing cumulative effects, to establish key preconditions for effective and efficient CEA. In particular, government should provide:

(1) a policy and planning framework that is sufficiently detailed, rigorous and prescriptive to provide meaningful guidance regarding the significance and acceptability of cumulative effects;

(2) the baseline information and analysis that is required to evaluate significant cumulative effects that result from past, present and likely future activities affecting the landscape in question; and

(3) a robust framework for cumulative effects management that permits decision makers at the project level to ascertain with reasonable certainty whether effective mitigation of significant adverse cumulative effects will be achieved in the event that the project is approved.

As the discussion to follow will show, none of these preconditions was in place for the Cheviot process. Before turning to these specific problem areas, the Cheviot project and the review process will briefly be described.

The Project and the Process

The Cheviot project includes an open pit mine, a coal processing plant, and the associated transportation infrastructure. The mine permit area is approximately 23 kilometres long and 3.5 kilometres wide, extending to a point 2.8 kilometres from the boundary of Jasper National Park. It ranges in elevation from 1700 to 2000

Résumé
L'évaluation des effets cumulatifs tente de fusionner la gestion intégrée des ressources et l'évaluation environnementale de projets précis. Bien que l'idée soit bonne, les résultats jusqu'à présent ne sont pas satisfaisants. Les problèmes inhérents à l'évaluation des effets cumulatifs sont illustrés par le rapport de la commission d'évaluation environnementale et la décision judiciaire ultérieure relatifs au projet de mine de charbon Cheviot.

L'auteur de cet article soutient que les défauts principaux du processus d'évaluation de la mine Cheviot sont attribuables à l'absence de conditions requises clés établies par le gouvernement pour évaluer effectivement et efficacement les effets cumulatifs. Le gouvernement devrait notamment établir: 1) un cadre de politique et de planification pour les prises de décision relatives à des projets précis; 2) une base de données et d'analyse adéquate au traitement des effets cumulatifs; et 3) un processus de gestion des effets cumulatifs qui permette aux décideurs d'un projet de déterminer s'il serait possible d'atténuer effectivement les effets cumulatifs négatifs importants si le projet était approuvé. Aucune de ces conditions requises n'existait dans le cas du projet Cheviot.

De façon plus générale, l'auteur soutient qu'il incombe au gouvernement, non pas aux promoteurs de projets, d'assumer un rôle moteur au cours de la phase des processus d'évaluation environnementale dédiée aux effets cumulatifs. Ce n'est que lorsque le gouvernement assume son propre rôle lors de l'évaluation des effets cumulatifs que l'évaluation environnementale et la gestion intégrée des ressources se rejoignent pour garantir que le développement progressif d'un projet n'entraîne pas d'effets environnementaux cumulatifs inacceptables.

metres, encompassing areas of alpine and sub-alpine vegetation and the headwaters of several streams.

The purpose of this project is to replace CRC's existing Luscar mine, which is close to exhausting its coal reserves. CRC predicts that the Cheviot mine will operate for at least 20 years, providing ongoing employment for the Luscar workforce. Annual production is estimated at about 3.2 million tonnes of coal, intended primarily for export.

The environmental issues raised by the Cheviot project reflect its size, location, duration and impact on the landscape. The loss and fragmentation of aquatic and terrestrial habitat and the disruption of wildlife movement corridors linking Jasper National Park to surrounding provincial land were particular concerns. Given the range and intensity of other land uses in the surrounding region, cumulative environmental effects emerged as a major focus of public, regulatory and judicial attention.

Since the Cheviot project raised regulatory issues within both federal and provincial jurisdiction, a joint review panel was established pursuant to the 1993 Canada-Alberta agreement on environmental assessment harmonization.[4] Project review and regulatory functions of Alberta's Energy and Utilities Board (EUB) and the EA responsibilities of the federal government under the *Canadian Environmental Assessment Act* (CEAA) were merged into a single process. Following public hearings, the *Report of the EUB-CEAA Joint Review Panel* was released in June 1997. The panel's recommendation that the project be approved was accepted by the federal government in October 1997, paving the way for project licencing.

Environmental groups opposed to the project responded by applying for judicial review, arguing among other things that the panel had failed to discharge its legal obligations under CEAA to consider cumulative effects. Mr. Justice Campbell of the Federal Court of Canada agreed with the applicants. In a decision handed down in April 1999, he quashed the project authorization issued by the federal Minister of Fisheries and set out a series of conditions to bring the EA into compliance with CEAA. The project proposal was then referred back to the panel for reconsideration, a process begun in September 1999.[5]

Although the final chapter of the Cheviot project review has yet to be written, the process has already yielded important insights into the difficulties of CEA when government fails to provide project proponents and review panels with adequate assistance on matters of integrated resource management. There are three areas where deficiencies in this respect were most acutely felt.

The Policy and Planning Framework

The first area where government land and resource managers could assist CEA is through the establishment of a detailed and prescriptive policy and planning framework for project-specific decision making. Section 16(1)(a) of CEAA requires consideration of the "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." Consideration must also be given to the "significance" of these effects (s.16(1)(b)).

Satisfying this requirement involves more than a technical understanding of the nature and environmental implications of cumulative interactions among various land and resource uses. A subjective evaluation of the significance and acceptability of cumulative impacts is also essential. This evaluation leads directly to a consideration regional limits for environmental disturbance and the trade-offs between the competing interests and values that underlie different resource management options.

Policy and planning documents could assist project proponents and review panels with this complex task in several ways. First, regional land-use objectives could be identified and prioritized. Second, guidance could be provided regarding the types of activities and the level of impacts that

are considered to be acceptable. Third, a means of reconciling various land and resource uses within parameters for overall cumulative effects could be established. Implicit in this last point is the need to recognize that trade-offs between competing uses may be required.

Of the material considered in the Cheviot process, the *Coal Branch Sub-Regional Integrated Resource Plan*[6] (IRP) was recognized by the panel as "the most recent and site specific" policy statement on land and resource use.[7] The IRP was helpful in that it specifically recognized coal mining as an acceptable land use in the area proposed for Cheviot project. It provided little assistance, however, in deciding whether the cumulative environmental effects would be acceptable once the Cheviot project was factored into the regional land-use equation. The IRP was also silent on the types of conditions that should be attached to project approvals in order to meet cumulative effects objectives, and on the implications for other land uses of the incremental contribution of a major project to regional environmental stresses. The conclusion that the Cheviot project is "conceptually consistent" with the regional IRP is the sum total of wisdom that the panel was able to extract from the government's policy and planning framework.[8]

One reason why more detailed guidance was not forthcoming from the IRP was the absence of specific priorities among land-use objectives. The IRP contains an extensive wish list of land and resource uses and management objectives. Explicit recognition of the need for trade-offs, however, is strikingly absent. In a classic example of 'multiple use' language, the IRP states that the "management intent" for the resource management area encompassing the proposed Cheviot project:

"... is to recognize a varied range of provincially significant resources such as coal, wildlife, extensive recreation, tourism and historical resources. A limited range of other multiple use activities will also be provided, while recognizing the importance of watershed protection."[9]

The lack of clear priorities is compounded by a zoning system that has limited value to CEA because it fails to include thresholds. As noted by Dias and Chinery:

"Land allocation mechanisms in integrated resource planning tend to focus on identifying kinds of activities that are appropriate in a given area, whereas ecological thresholds would focus on the level of activity, and more importantly, on identifying *acceptable levels of impact to the ecosystem.*"[10]

Without limits on the intensity of permitted uses and overall thresholds for cumulative impacts on valued ecosystem components, land use zoning provides little to assist project proponents and review panels with the subjective components of CEA.

The policy and planning framework for the Cheviot CEA was thus unable to provide more than minimal guidance regarding project acceptability. On the key issues for CEA, it offered virtually nothing that the Cheviot panel could use in determining how the proposed project should be reconciled with other land and resource uses in the area.

Baseline Information

Obtaining the required baseline information and analysis is a second area where CEA is problematic without government assistance. The difficulties in this area encountered by CRC and the review panel raise serious questions about the adequacy of the Cheviot CEA and paved the way for the successful application for judicial review.

The inability of CRC to obtain relevant information on forestry operations is clearly documented in the panel's discussion of impacts on aquatic habitat and fisheries:

"The Panel ... notes that CRC, in attempting to carry out an assessment of potential cumulative effects..., stated that it was unable to obtain the necessary information from other industry sources, particularly forestry. The Panel can appreciate the difficulty that this creates for an applicant. Given that a CEA is a requirement of both the provincial and federal EIA process, *the Panel believes that the government has a responsibility for ensuring either that needed data can be collected or alternatively, that the current legislation is amended to recognize the limitations that lack of cooperation between industry sectors or companies within a sector can create for a CEA.*"[11]

The panel was, however, prepared to accept the proponent's use of "data from the Tri-Creeks watershed as a surrogate measure of the likely effects of modern forestry practices".[12] On this basis, it concluded that the cumulative effects of coal mining and forestry would not have a significant impact on regional fisheries resources.

The Federal Court took a different view of the panel's obligations. Mr. Justice Campbell found that the panel's failure to obtain available information regarding forestry operations in the vicinity of the Cheviot mine was a breach of its statutory duty to consider cumulative effects. He noted that evidence presented in court "conclusively proves that extensive logging and road building activities are likely to the northeast, east and southeast of the mine site over at least the next seven years."[13] In addition to confirming the relevance of information on forestry operations to the Cheviot CEA, this evidence led Mr. Justice Campbell to conclude that the panel's assessment of cumulative effects on ungulates relied "on the apparently erroneous assumption that forest cover would be maintained" in the area surrounding the mine.[14]

The panel also elected to proceed in the absence of information on proposed mining projects in the same region as the Cheviot project. Despite evidence that the Alberta government had granted approvals in principle and permits for a number of other coal projects in the region,[15] the panel rejected an intervener's request that it require production of copies of the preliminary disclosure documents for these proposed projects.[16]

Here again, Mr. Justice Campbell found the that the panel had been too

passive in the face of information deficiencies. He concluded that the panel had both the power and the legal duty to compel the production of available information on other mining projects and then to decide on its relevance.[17]

The dilemma for CEA is clear. Primary responsibility for information provision and project justification falls to the project proponent within the EA process. The information on forestry and mining operations that was essential to the Cheviot CEA was, however, unavailable to CRC. The panel recognized CRC's position and chastised government for its failure to back legal CEA requirements with the means to ensure full information disclosure. Ultimately, however, the panel decided not to assert its independence by ordering the production of missing information. The result was litigation and delay, the costs of which fall most heavily on CRC and those with a direct economic stake in the Cheviot project. The court's findings also cast serious doubt on the credibility of the Cheviot CEA from an environmental management perspective.

The frustration of both project proponents and environmentalists with this process is understandable. The efficiency and effectiveness of the Cheviot review were both casualties of the Alberta government's unwillingness to make available information directly relevant to CEA. While this deficiency could have been addressed to some degree by a more assertive panel, the fact remains that the Cheviot CEA lacked critical support in the area of baseline information and analysis from the provincial government agencies responsible for integrated land and resource management.

Cumulative Impacts on Carnivores

The third area where government has a key role to play in CEA concerns the mitigation of significant cumulative effects and the management of inevitable uncertainties regarding future impacts. Problems in this area are clearly demonstrated by the Cheviot panel's approach to cumulative impacts on carnivores. CRC, environmental interveners, government agencies and the panel all agreed that the Cheviot project would contribute to already significant stresses on regional populations of grizzly bears, wolves, wolverines, and cougars. The panel also candidly acknowledged that it "was unable to predict the spatial extent of these impacts on carnivores beyond the general mine permit area".[18] Furthermore, it accepted the argument that "the available site specific mitigation strategies for carnivores, including corridors are, without major and costly changes to CRC's conceptual mine plan, unlikely to be successful in reducing the impacts on carnivore populations significantly".[19] Since the panel was unwilling to require significant changes to the mine plan, it agreed with CRC that a regional approach was essential to manage cumulative effects on carnivores.

Reflecting the proponent-driven nature of the EA process, CRC came forward with a proposal for a "carnivore compensation program".[20] This regional, multi-stakeholder process was to include the establishment of a Carnivore Compensation Advisory Board to prepare a carnivore management action plan. Specific criteria for success were to be developed using parameters such as species distribution, population levels, mortality, and measures of habitat quality and effectiveness (e.g., connectivity). The use of "research in an adaptive management context" was proposed "to test, and validate or revise, the criteria for success".[21]

The specific objectives of the carnivore compensation program were to:[22]

"(1) monitor and understand sensitive ecosystem elements to facilitate management decisions affecting carnivores;

(2) monitor and understand human uses and changes to the land base to facilitate management decisions affecting carnivores;

(3) develop land management options for carnivores and their ecosystems;

(4) develop education and outreach programs regarding carnivores and their supporting ecosystems;

(5) monitor people's knowledge, attitudes, opinions, actions, and values regarding carnivores and supporting ecosystems;

(6) implement a baseline study of the historic ecology of carnivores and their ecosystems in the region; and

(7) establish an organizational structure for the program."

CRC's suggested administrative structure included provincial, federal and industrial representation and consultation with other interested stakeholders. Implementation would be addressed "through a multi-level committee structure with management authority remaining with agencies currently having those responsibilities".[23] On this basis: "CRC stated that the impacts of the proposed development on carnivores, after considering mitigative measures and the proposed compensation program, would be, in its view, considered to be insignificant".[24]

Although the carnivore compensation program was proposed by a private sector proponent as a mitigation measure for a specific project, it is nothing less than a blueprint to address regionally significant cumulative effects through integrated resource management. As a general policy prescription, there is much to recommend this approach. The federal government's response to the Cheviot panel report stated bluntly that:

"increasing cumulative effects, combined with a lack of cooperative goals among various land managers and effective regional landscape management mechanisms, threaten the viability of species such as grizzly bears. Since grizzly bears act as an indicator species, adverse effects on many other species could be expected."[25]

The need for a regional regime to address cumulative environmental effects is undeniable. The specific proposal that emerged from the

Cheviot process, however, has several peculiar features.

The first is the pivotal role assigned to CRC and the vagueness surrounding government commitment and involvement. The panel report contains no indication of whether, or how, the Alberta Ministry of Environmental Protection (AEP) [now Alberta Environment] intended to exercise its land and resource management responsibilities in support of the carnivore compensation program. AEP indicated that it had "no objection to the [project] application with regard to carnivores" and specifically asked to be consulted on CRC's monitoring studies and on any mitigation measures recommended by the panel.[26] Astoundingly, AEP's specific reaction to the carnivore compensation program as reported by the panel is limited to the recommendation "that the Panel require CRC to act as a *catalyst* in generating multi-stakeholder support for the implementation of the carnivore compensation plan and that CRC be required to contribute to a fund for the purposes of carnivore habitat mitigation".[27]

Apparently following AEP's lead, the panel stated its intention to require, as a condition of project approval, that CRC "honour its commitment to act as both a catalyst and a stakeholder in such a process".[28] CRC has, however, no authority to implement this ambitious undertaking and little leverage, at best, over the other key players whose participation is essential. The Cheviot panel thus apparently endorsed the very questionable proposition that a private coal company should serve as the key *catalyst* for a complex multi-stakeholder process directed at defining regional land use objectives and, ultimately, coordinating a multitude of activities on public lands with a view, presumably, to furthering the public interest in sustainable development and environmental protection.

A second and related point concerns the compensation issue. Although the word 'compensation' is prominent in the name of the proposed program, the concept itself receives scant attention in the panel report beyond the statement that "the Panel is prepared to consider CRC's proposal to compensate for lost carnivore habitat *in areas outside the Cheviot Coal Project* as a reasonable option".[29] The panel briefly discussed changes in access management in the upper Cardinal River basin as one compensation alternative, but it declined to make project approval conditional on any specific compensation measures.[30]

However reasonable the compensation option may appear to CRC and the panel, it involves externalizing the environmental costs of the Cheviot project onto other land and resource users. The region in question, it should be noted, is already subject to extensive resource dispositions and pressures from recreational users. Given the inevitably conflicting interests and very limited examination in the panel report of concrete compensation options, a measure of scepticism regarding the proponent's ability to deliver on this aspect of the program seems well justified.[31] Furthermore, the compensation component of CRC's program is highly problematic from the perspective of any multi-stakeholder process with CRC as a catalyst.

Vagueness surrounding the regulatory sanction is a third major concern with the carnivore conservation program. CRC is simply required to advise the EUB annually on the status of this program and "provide evidence of measurable success in establishing" the program "within three years of receiving approval for the project and before unmitigable impacts have occurred".[32] The panel refrains, however, from specifying criteria for measuring success and its choice of words suggests that progress in *establishing* the program, as opposed to concrete measures to mitigate cumulative effects on carnivores, is the standard to be met.

Furthermore, the panel does not set out the regulatory implications for CRC if the carnivore compensation program fails. It states simply that, in the absence of evidence of success after three years, CRC should indicate "what alternative steps it is prepared to take to mitigate/compensate for effects on carnivore populations".[33] Although unmitigable impacts may not have occurred within the time frame suggested by the panel and significant changes to project design and execution are theoretically possible at that stage, the Cheviot project will be fully operational with its financing, infrastructure and work force in place. As a result, the practical options for an effective regulatory response to a failure of the proposed mitigation strategy are likely to be extremely limited.

The final notable feature of the carnivore conservation program is the panel's willingness to accept this very preliminary and ill-defined regional strategy as a specific mitigation measure for addressing cumulative effects. Clearly, adaptive management is in some circumstances an appropriate response to uncertainty regarding project-specific and cumulative effects. In the Cheviot report, however, the response to uncertainty regarding cumulative effects on carnivores is to endorse a mitigation strategy that is itself riddled with uncertainty.

The panel is not, of course, oblivious to these concerns. It comments that "the level of proactive participation by companies in such processes tends to be directly tied to the degree that a program may affect their present operations or future approvals".[34] In addition, it tactfully adds: "Government, ... while wishing very much to participate in a comprehensive manner, often has difficulty in identifying adequate resources".[35] The panel also suggests a way forward:

"In order to assist CRC in gaining the economic as well as the moral support of other industries in the region, the Panel believes that both the EUB and AEP *may* need to re-examine the process by which new licences are granted to other regional industry players for developments which may also have a cumulative effect on carnivores. Such changes *may* be timely, given the fact that both provincial and federal environmental legislation now recognize that it is no longer adequate to examine the

environmental impacts of a proposed development in isolation, but rather the cumulative effects must be considered. The Panel also believes that the government agencies will *very likely* need to identify the specific resources they can make available for their participation in the Carnivore Compensation Program in order for it to be effective."[36]

These suggestions, phrased in surprisingly tentative language, fall far short of a set of forceful recommendations or formal preconditions for project approval. Consistent with the highly deferential tone that runs throughout its report, the panel avoids taking a decisive position on the deficiencies in cumulative effects management that constitute both the principal rationale for CRC's proposed mitigation strategy for carnivores and the major threat to this initiative.

Conclusion: A Role for Government in CEA

The Cheviot process suggests that CEA has not yet succeeded in combining EA and integrated resource management in a way that achieves both regulatory efficiency and a credible environmental management strategy for considering cumulative effects at the project review stage. The conventional EA model of a reactive, project-specific and proponent-driven review process is simply unable to cope adequately with the challenges of integrated resource management that are inherent in CEA.

What is wrong with the current CEA picture is the extremely low profile — to put it kindly — of government as land and resource manager. The solution is to recognize that the CEA component of project review must be government-driven, not proponent-driven. Government agencies responsible for integrated land and resource management should be *required* to take a leadership role in providing both proponents and review panels with the toolkit necessary for CEA. A policy and planning framework that sets land-use priorities and thresholds, adequate baseline information and analysis, and a robust framework for managing and mitigating cumulative effects are key elements of that toolkit.

The principal lesson from the Cheviot process is that the onus for establishing credible cumulative effects management in the context of CEA should lie with government, not project proponents. The result would be a significant improvement in the effectiveness, efficiency and fairness to proponents of CEA. Only when government assumes its proper role in the CEA process will EA and integrated resource management come together to ensure that incremental project development can occur without producing unacceptable cumulative environmental effects.

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Notes

1. Alberta Energy and Utilities Board & Canadian Environmental Assessment Agency, *Report of the EUB-CEAA Joint Review Panel, Cheviot Coal Project*, June 1997 [hereinafter Cheviot Report].

2. *Alberta Wilderness Association* v. *Cardinal River Coals Ltd.*, [1990] F.C.J. No. 441, Court File No. T-1790-98, F.C.T.D.

3. Richard Neufeld, "The Pit and the Pendulum - The Search for Consistency in the Law Governing Environmental Assessment" (1999) 67 *Resources* 1.

4. *Canada-Alberta Agreement for Environmental Assessment Cooperation*, 6 August 1993.

5. Alberta Energy and Utilities Board & Canadian Environmental Assessment Agency, *Prehearing Meeting Cardinal River Coals Ltd.*, Memorandum of Decision 1999-09-23.

6. Alberta Forestry, Lands and Wildlife, *Coal Branch Sub-Regional Integrated Resource Plan*, Edmonton: 1990.

7. Cheviot Report at 126.

8. *Ibid.*

9. *Supra* note 6 at 66.

10. Oswald Dias & Brian Chinery, "Addressing Cumulative Effects in Alberta: The Role of Integrated Resource Planning" in Alan J. Kennedy, ed., *Cumulative Effects Assessment in Canada: From Concept To Practice* (Calgary: Alberta Association of Professional Biologists, 1994) at 314 (emphasis in original).

11. Cheviot Report at 56 (emphasis added).

12. *Ibid.*

13. *Supra* note 2 at 13.

14. *Ibid.*

15. *Ibid.* at 14-15.

16. Cheviot Report at 15.

17. *Supra* note 2 at 15.

18. Cheviot Report at 86.

19. *Ibid.* at 88.

20. *Ibid.* at 79-81.

21. *Ibid.* at 81.

22. *Ibid.* at 80-81.

23. *Ibid.* at 81.

24. *Ibid.*

25. *Federal Government Response to the Environmental Assessment Report of the EUB-CEAA Joint Review Panel on the Cheviot Coal Project*, October 1997, at 9.

26. Cheviot Report at 82.

27. *Ibid.* at 83 (emphasis added).

28. *Ibid.* at 88.

29. *Ibid.* (emphasis added).

30. *Ibid.* at 90.

31. The Cheviot Report documents the lack of confidence in this program on the part of the environmental groups that participated in the hearing (pp.81-82).

32. Cheviot Report at 159.

33. *Ibid.* at 89.

34. *Ibid.*

35. *Ibid.*

36. *Ibid.* (emphasis added).

Recent Developments in Canadian Oil and Gas Law

*by Nigel Bankes**

Evidentiary threshold necessary to maintain a caveat

In *United Pioneer Oil and Gas Ltd v. Eberle* (1999) SJ 714, (QB), United sought to maintain a caveat protecting a png lease with an option to renew that had been granted in 1950 by Eberle`s predecessor in title. The lease was for a 33 year term commencing upon the termination of an existing lease. While the court was prepared to infer the commencement date of the lease on the basis of the available evidence, there was no evidence that the option to renew the lease had ever been exercised and neither was there any evidence that United was the successor in interest to the original grantee. Consequently, United's application to maintain the caveat was denied and it was unnecessary to consider Eberle`s alternative argument based upon the rule against perpetuities.

Court of Appeal Reverses the *Liebing* Decision

In the Spring 1999 issues of *Resources* 66, I argued that *Liebing et al v. North Alberta Land Registration District* presented a set of facts that was indistinguishable from *Krautt v. Paine* (1980) 6 WWR 717 (Alta. CA) and was therefore wrongly decided. The Court of Appeal in a judgement handed down November 25, 1999 apparently agrees. The Court`s well reasoned decision provides renewed authority for a series of useful propositions. (1) A person acquiring a title or re-acquiring a title by virtue the registrar's correction is a mere volunteer. (2) The Land Titles Act is not designed to protect volunteers. (3) Limitations arguments are not relevant in an action for declaration of title. (4) Payment of taxes in relation to a mineral property does not constitute adverse possession so as to cause time to run against the true owner. (5) Filing a caveat does not cause time to run against the true owner since a caveat does not create rights but merely protects them.

Monies Payable to Unit Trust Holders unless Mineral Owners Commence an Action

The fall out from *Guaranty Trust Co. v. Hetherington* (1987),50 Alta. L.R. (2d) 193 (aff'd) on different grounds, (1989), 67 Alta. L.R. (2d) 290 (CA), the *GRTA Test Cases* (1993), 8 Alta. L.R. (3d) 225, aff`d (1994), 23 Alta. L.R.(3d) 193 (CA) and *Barrett v. Krebbs* (1995), 27 Alta. L.R.(3d) 27, aff'd (1996), 37 Alta. L.R. (3d) 274 (CA) continues. In *Hetherington* the Court of Appeal decided that a PTC-1 GRTA expired along with the original lease when the lease on which it was based expired in accordance with its own terms and that the GRTA therefore did not bind subsequent leases of the same mineral rights. The *GRTA Test Cases* established that in many other cases the GRTAs would be effective to create an interest in land that would bind subsequent purchasers if properly caveated.

When all this litigation commenced, trust companies typically sought and were granted interpleader orders with the monies paid into court pending further direction. As the above decisions clarified the position of the various interests, some mineral owners brought applications to 'collapse' existing GRTAs covered by interpleader orders on the basis of affidavit evidence. In other cases GRTAs were continued, for whatever reasons, by 'patch' agreements amongst the parties. But in still other cases the interpleader orders continued. In the current case *Montreal Trust Co v. Astl* (1999) AJ 1335 (QB), MTC sought further direction. Should it pay the interplead monies to the mineral owners or to the beneficiaries under the GRTA?

In an interesting decision Justice Mason ruled in favour of the beneficiaries on the grounds that, since some of the cases emphasise the intentions of the parties to the original GRTAs, it was inappropriate for the court to alter the status quo, a presumptively valid agreement, unless the mineral owners were prepared to follow the procedure established for a 'collapse order' and file the appropriate affidavit evidence.

In the result, the decision is nothing more than a decision as to who should bear the burden of acting as plaintiff and bringing the appropriate evidence before the court. While the decision may be praised as offering a helping hand to the 'poor' unit trust holders who will likely be more numerous than the mineral owners (although in the case of some mineral estates retained in the same family through several generations the undivided interests may be very small)it seems to me to afford too much support to Justice Cairns dicta in *Krebs* and to feed further litigation by emphasising the differences rather than the similarities between GRTA fact patterns. These differences will likely prove chimerical but we`ll all have to go to the Court of Appeal, once again, to establish that. What a waste and what a false hope!

The Tax Treatment of Payments under the Saskatchewan *Road Allowances Crown Oil Act*

The *RACOA* has been around for a long time and first saw litigation in *Imperial Oil Ltd. v. Placid Oil Co.* (1963), 39 DLR(2d) 244 (SCC). The Saskatchewan Government took the view that since it was the owner of the mineral rights underneath road allowances it should be entitled to a share of all production. The *RACOA* gave effect to that claim and required all producers to pay a small percentage of all production to the Government. The *Act* remains one of the few instances in which a government has rejected the implications of the Rule of Capture and stipulated instead a scheme that provides at least one class of owner with an ownership interest that is not subject to defeasance.

But what is the legal character of such a payment and what is its tax treatment? Are such payment royalties? In *Mobil Oil Canada Ltd v. Canada* (1999) FCJ 1501, Justice Nadon of the Federal Court, Trial Division has decided that such payments are indeed royalties or payments in lieu of royalties within the meaning of the federal *Income Tax Act* and therefore not deductible. The case contains a useful discussion of the background to the 'resource allowance' concept as used in the *ITA*.

Ambulatory references in commercial contracts unusual

The Ontario Court of Appeal has affirmed the trial decision in *Oceanic Exploration Co. v. Denison Mines* (1999) OJ 4813 (Ont. C.A.). Oceanic held a net profits interest in a Greek offshore concession agreement that it had assigned to Denison. Denison and Oceanic re-negotiated the terms of the concession and the issue was whether Oceanic`s NPI was to be calculated by reference to the original

concession or the concession as amended. The Court of Appeal agreed with Oceanic`s contention that the parties intended the calculation to be made under the terms of the original agreement. The court clearly believed that had the parties intended an ambulatory reference they would have had to have used very explicit language to that effect. After all, the NPI agreement was intended to provide commercial certainty and this could scarcely be achieved if one of the parties could change the basis of the NPI calculation.

The court took the view that the NPI agreement was not ambiguous and that it was therefore unnecessary to refer to the subsequent conduct of the parties or the commercial reasonableness of the outcome. The court also found it unnecessary to comment on Justice Feldman`s application (in the alternative) of the principle of good faith.

Regulatory tribunals and three leave to appeal applications

Although I do not usually note cases judicially reviewing the decisions of energy regulatory tribunals, a series of three decisions over the last couple of months deserves at least a passing note: *Calgary North H2S Action Committee v. Alberta (Energy and Utilities Board)* (1999) ABCA 323 (Alta. CA), *Paramount Resources Ltd. v. Metis Settlements Appeal Tribunal* (1999) ABCA 348 (Alta. CA) and *Union of Nova Scotia Indians v. Maritimes and Northeast Pipeline Management Ltd.* (1999) FCJ 1546 (FCA).

In the *MNP* case the Federal Court of Appeal ruled that the National Energy Board breached the rules of procedural fairness when it decided that MNP had met one of the conditions of its certificate of public convenience and necessity without first giving the UNSI, a materially interested intervenor, the opportunity to make submissions on this point. The Board`s decision was therefore invalid. The applicant had no need to raise this issue before the Board before seeking relief from the Court. It was not appropriate for the court itself to determine that the condition had been met.

In the *Paramount Resources Case* the court was asked to give leave to appeal a decision of the Metis Settlement Appeal Tribunal Existing Leases Land Access Panel (ELLAP) on a preliminary jurisdictional decision. Justice Fruman declined to grant leave noting that in order to obtain leave the applicants must raise serious and arguable points of law or jurisdiction. The jurisdictional issues seem complex and involve such difficult issues as: the proper interpretation of the phrase 'all parties involved in the difference' (apparently this does not include a party with a contingent liability based upon an indemnification clause); can an assignment and novation agreement that has been executed and acted upon by some but not all of the parties amount to an agreement to confer jurisdiction upon the ELLAP (apparently so); does the ELLAP lose jurisdiction just because some of the remedies sought by one of the parties might, if granted, cause the ELLAP to act like a s.96 court (clearly not; this is an issue that could only be faced once the ELLAP had made its decision).

Finally, in the *H2S Case* Justice Hunt also denied leave to appeal on a decision of the Alberta Energy and Utilities Board to grant a well licence to Canadian 88 for a sour gas well. The licence was to be issued subject to the applicant satisfying the Board on some 18 listed conditions. The following points emerge from the judgement: a condition is not ambiguous if its meaning can be appreciated in light of the full report of the Board; there is no improper delegation where the Board requires the applicant to establish to its satisfaction that other persons (e.g. municipalities are capable of providing certain services); the Board is not required to give special or enhanced consideration to the views of an intervenor that happens to have specific statutory responsibilities (e.g. a regional health authority); there is no breach of the Board`s obligation to make its decisions in accordance with the procedural fairness requirements of the statute where the Board requires the applicant to satisfy itself of certain critical matters especially where these conditions were included at the behest of intervenors and pursuant to specific statutory authority to make licences conditional. In any event, this latter argument was premature since it was conceivable that intervenors would have further opportunities to comment.

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

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