

No. 7

## Negotiating the Disposition of Crown Resources: Forest Management Agreements in Alberta

by Nigel Bankes

Although Alberta possesses a highly sophisticated regime for the disposal of Crown-owned petroleum and natural gas, the techniques it has developed to dispose of forestry resources have attracted little attention. Given the relative significance of the two sectors to the provincial economy, this is hardly surprising. Yet as an example of a system that relies heavily on negotiation as a technique for resources disposition, Alberta's forestry regime offers some useful advantages, especially where multiple resource-use is a possibility.

In western Canada the Crown has a virtual monopoly on growing timber. From a relatively early date in the prairie provinces and British Columbia, timbered lands were withdrawn from permanent settlement and such timber rights as were released were generally disposed of by lease or licence, with the fee remaining vested in the Crown. Nevertheless, the rights granted were often very durable and of a substantial nature. The old licences and timber berths, for example, were perpetually renewable for so long as merchantable timber remained on the lands. They carried no obligation to cut minimum volumes and did not oblige the licensee to reforest. Rather, the licensee simply moved on to new lands when the old limits had been exploited. These tenures were generally of a standard form and granted on the basis of a bonus bid and/or payment of stumpage.

During the last 30 to 40 years the trend has been away from Crown timber tenures of this nature and towards volume-based timber rights and large-scale negotiated agreements that enshrine the principles of sustainable yields and multiple crops of forest products from the same lands. The volume-based timber rights have taken the form of quotas or licences to harvest a specified proportion of an annual allowable cut in a forest management unit or a public sustained-yield unit. The large-scale negotiated agreements have taken the form of tree farm licences, forest management agreements, and pulpwood and plywood agreements.

In Alberta the first large-scale timber agreements to be negotiated were pulpwood agreements in the 1950s, followed by a series of forest management agreements

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(FMAs) from the mid-1960s to the present. The FMAs in Alberta have been used to encourage investment in major capital facilities, and to develop a forest industry which has traditionally been overshadowed both by that of its western neighbour and by its own oil and gas industry. The agreements grant secure, long-term rights to harvest successive crops of timber growing on large tracts of Crown lands. In return, the FMAs require holders to construct and operate expensive industrial facilities such as pulp mills, saw mills, and flake board plants. Because of their very size and nature, the FMAs - like their British Columbia counterparts - the tree farm licences (TFLs) - raise interesting legal and public-policy problems. For example, what procedures are followed to ensure that such an important public resource is fairly allocated? How can the Crown retain flexibility in its disposal of public resources while at the same time granting the private party security of tenure? To what extent should FMA lands be available for other potential uses, such as recreation, strip mining, and oil and gas exploration and development? Is private management consistent with public ownership of the resource? And, is it justifiable to create a special regime for FMA holders exempting them either from general regulations on Crown dues or from other elements of the timber-management regulations?

The Alberta *Forests Act* (R.S.A. 1980, c.F-16) is remarkably silent on the procedures to be followed by the government prior to allocating such a major block of Crown resources. Section 16 of the Act simply provides that the "Minister with the approval of the Lieutenant Governor in Council, may enter into a forest management agreement with any person to enable that person to enter on forest land for the purpose of establishing, growing and harvesting timber in a manner designed to provide a perpetual sustained yield." This silence is in stark contrast to the procedures prescribed by s.27 of the British Columbia *Forests Act* (R.S.B.C. 1979, c.140) before the Minister may enter into a TFL. Section 27 requires that the Minister publicly advertise and invite applications for a TFL, hold a public hearing on the applications, and review each application in accordance with specified criteria. These criteria include such matters as: employment, utilization of Crown timber, contributions to Crown revenues, and ability to meet environmental quality standards. *In practice*, the Alberta Forest Service apparently follows similar procedures prior to granting FMAs. This is done merely as a matter of policy and not because it is required by either the Act or the regulations. Consequently, one does not have the same confidence that the allocation of public resources will be fair, open, and in accordance with publicly announced criteria.

The first Alberta FMAs negotiated in the mid sixties are noticeably more generous in their terms than recent agreements. This is in part a reflection of government policy, but in part it is also a reflection of the fact that the negotiating position of the Crown has been strengthened since the mid-1960s by increasing shortages of wood fibre in the traditional areas. The Procter and Gamble Agreement of 1969 (O.C. 1/69), for example, has several clauses which seem in retrospect to be inordinately favourable to the company. The agreement itself establishes a formula for determining the level of Crown dues payable on timber harvested over a 40 year period, thereby exempting the company from the dues specified by the generally applicable timber management regulations. It is clear that companies would prefer to obtain a contractual commitment of this type. It allows them to keep the level of Crown dues within certain parameters and facilitates both financing and the calculation and prediction of return on invested capital. It is less clear that such a commitment was required, not merely for the initial term of 20 years, but also for the first renewal period.

One other remarkable clause in the same agreement provides that the Government of Alberta shall contribute to the capital costs of water and air pollution facilities required by the company to meet provincial pollution control standards. By contrast, the most recent FMAs have removed these elements of special status and have reaffirmed the efficacy of generally applicable statutes and regulations.

The public policy goal of multiple use of Crown lands has been achieved in the FMAs by careful drafting of the clauses granting the timber rights, and by the reservation to the Crown of the right to withdraw lands from an FMA for a wide variety of reasons. With respect to the former technique, the agreements typically grant the rights "to establish, grow and harvest timber ... on a perpetual sustained yield basis." Certain rights are specifically reserved to the Crown, including the rights of others to hunt, trap, fish, and to use the lands for recreational purposes and limited grazing. In addition, authorized geological and geophysical exploration is permitted on FMA lands, subject only to an obligation on the explorer to pay reasonable compensation. It is on the authority of these reservations that oil and gas exploration, including the cutting of seismic lines, has been permitted to proceed in FMA areas, essentially unchecked.

Equally important, however, is the right reserved to the Minister of Energy and Natural Resources to withdraw lands from an FMA for, *inter alia*, any purpose "deemed by the Minister to be essential for the human or physical resource development of the province." This withdrawal clause has provided an essential element of flexibility for the province in its dealings with at least one FMA holder, St. Regis (Alberta) Ltd. The St. Regis FMA in central Alberta is also underlain by substantial deposits of thermal coal, and during the last few years several applications from companies such as Manalta, Union, and Mercoal to develop strip mines in the area have been approved by Alberta's Energy Resources Conservation Board. Obviously such a use of the land is totally incompatible with sustained-yield forestry operations and the areas will therefore have to be (or already have been) withdrawn from the FMA, even though the expectation is that the mine sites will ultimately be reclaimed for forestry purposes. St. Regis has estimated

that coal developments planned for the area will probably withdraw a total of six percent of the FMA in the near future.

Thus, through the withdrawal clauses, the Crown has retained considerable flexibility to allocate the resource base in the broad public interest. The FMA holder is generally compensated for its loss, either monetarily or by the addition of an equivalent adjacent area of suitably forested Crown land. Hence, the needs of both parties are taken into account in preserving this flexibility.

The withdrawal clause represents one technique that the Crown uses to protect the broader public interest when dealing with provincial resources. Two other approaches also merit review: restricting the term of the tenure and "compliance with laws" clauses. The first is straightforward. By granting timber rights for a limited term with no obligation or right to renewal, the Crown has the opportunity to review the prudence of the grant at the expiry of the term and to revise it as appropriate. Although the Alberta FMAs all enshrine the principles of harvesting timber on a perpetual sustained-yield basis, the original term of the FMA is limited to 20 years. There is no absolute *right* to a renewal, but merely the option to negotiate mutually acceptable terms and conditions of a renewal, which must also meet the approval of the Lieutenant Governor in Council. Thus there is ample opportunity to revise the terms of the FMA in light of changed technologies, different market situations, and altered pricing structures. All the Alberta FMAs have been granted for limited terms, and the Alberta government has never made the mistake of its British Columbia counterpart of granting tree farm licences with perpetual terms.

Each of the FMAs guarantees certain rights to the holder. As a matter of normal contract law these rights may not be set aside unilaterally, but in some cases the instrument itself may envisage modification by the Crown. For example, recently negotiated FMAs in Alberta, such as one with British Columbia Forest Products Limited, provide that timber dues are payable at the same level as dues established pursuant to the generally applicable Timber Management Regulations. This is buttressed by a requirement that the companies comply with the terms of the *Forests Act*, regulations, and other provincial statutes as amended and in force from time to time. Although such compliance with laws clauses require careful drafting to bind the companies to *future* regulations, rather than simply the regulations in force at the time of the contract, if successful they provide an important means of preserving government flexibility.

The FMAs grant the companies substantial management rights over Crown resources; indeed, this is one of the basic aims of the agreements. But the discretion of the companies to manage the lands and the resource is certainly not unfettered. The FMAs generally require that the company conduct its operations in accordance with a forest management plan, which in turn is based upon ground rules agreed to by both parties. Similarly, the FMAs impose minimum cut requirements on the companies, require the approval of annual operating plans, and impose standards for reforestation.

The Alberta FMAs constitute interesting examples of major negotiated dispositions of Crown resources. As a

compromise between government flexibility and private security of tenure, the specific terms of the FMAs reflect the respective negotiating positions of the parties - although certain policies are consistently espoused in the agreements. Above all, the agreements illustrate how a Crown resource may be used to stimulate economic development in a region, while at the same time preserving some flexibility with respect to future use of the resource base.

## **Acid Rain: Bilateral Environmental Management in Jeopardy**

The recent introduction of acid rain as an issue in the United States presidential primaries by both leading Democratic candidates, Walter Mondale and John Glenn, is not unrelated to the importance of the issue in New Hampshire, a state which stands to suffer heavy damage to its lakes if the problem is not resolved. The relatively strong steps proposed by the contenders (and especially by Mondale) are in striking contrast to the position taken by the present Administration in the United States. Not surprisingly then, the discussion has also attracted a more-than-usual amount of attention in Canada.

Apart from its domestic significance in both the United States and Canada, acid rain has become a serious thorn in their bilateral relations. While the two countries can be expected to disagree on a range of matters of mutual concern, this specific problem holds particularly grave implications, not only for its *physical* ramifications, but also for its impact on dispute resolution and avoidance, especially with respect to environmental issues. It is this latter aspect which is of interest here.

Canada and the United States have an impressive record of cooperation on transboundary problems of resource management. This history dates at least to the Boundary Waters Treaty of 1909, itself the result of a series of problems which had arisen over the use of transfrontier waters. The most significant result of the treaty was the creation of the International Joint Commission (IJC), a bilateral body which, over the succeeding years, has established a high reputation as a generally non-politicized forum for investigating and reporting on problems of transboundary water management (as well as taking a limited role with respect to air pollution).

Perhaps the most impressive achievement of the IJC has been its success in defusing highly-charged issues through its reliance on skilled technical advisory bodies. Of special significance is the technique, adopted in the Great Lakes Water Quality Agreements of 1972 and 1978 (for which the IJC is given the primary responsibility for implementation), of referring technical matters to joint working groups of experts from each country.

Against this background, one might have expected a similar approach to the problem of acid precipitation. And indeed, as acid rain was recognized as a potentially serious threat in the late 1970s, it seemed that bilateral cooperation on the problem would be structured very much along the lines of the Water Quality Agreements. Following reports in 1978 and 1979 by a joint working group on the long-range transport of air pollution, Canada and the United States negotiated a Memorandum of Intent (MOI) on acid

precipitation, signed on 5 August 1980. Although the MOI did not provide firm commitments to reduce sulphur dioxide emissions - which are generally regarded as the key factor in above-normal acidity of precipitation - it did recognize the existence of a problem and set a deadline (later postponed) for the initiation of formal negotiations towards a bilateral treaty on the problem.

In order to provide a background for these negotiations, joint technical/scientific work groups were established under the MOI, with a mandate to report back to a coordinating committee. On its face then, the structure of the MOI process draws heavily on the experience of the IJC with respect to Great Lakes water pollution. However, in practice, the process has been far from an unqualified success in providing the foundations for a treaty. The work groups proceeded at a slower pace than anticipated, and although the final reports of the key groups have been available for approximately a year now, negotiations on a formal agreement have been in limbo since the fourth negotiating session in June 1982. At that meeting U.S. representatives rejected a February 1982 proposal by Canada (based on preliminary results from the work groups) of a 50 per cent reduction in sulphur dioxide emissions in return for concomitant roll-backs in the United States. It is nearly two years since the Canadian offer, but as yet there has been no firm counter-offer by the United States. What has gone wrong?

There have been accusations by senior Canadian officials of direct and indirect interference by the Reagan Administration in the work-group process. And to a degree this could explain the division along national lines on some key conclusions in the final reports, with U.S. members dissenting on the extent to which certain relationships in the acidification process have been adequately explained. This disagreement was further reflected in the peer review process, conducted (at U.S. insistence) independently by each country - in Canada under the auspices of the Royal Society, and in the United States under the direction of the Presidential Science Advisor, a post within the Executive Office of the President (although a body comparable in independence to the Royal Society does exist in the United States - the National Academy of Sciences). Interestingly, while the Canadian panel included scientists from several countries (including the U.S.), the American panel drew only on U.S. residents. Perhaps not surprisingly, although both peer reviews note deficiencies in the work-group reports, the Royal Society panel nevertheless found a clear case for immediate reduction of sulphur dioxide emissions, while the U.S. review stressed the incomplete state of knowledge and the need to concentrate on "particularly economically effective steps" in any remedial action.

The appointment of William Ruckelshaus to head the United States Environmental Protection Agency in the spring of 1983 was considered a promising sign in Canada. Mr. Ruckelshaus has since presented a number of options for dealing with acid rain to the U.S. Cabinet Committee on Natural Resources and the Environment. However, the issue reportedly has been difficult to resolve within Cabinet, and as yet no decision has been reached on which path should be pursued. Whatever path is selected, it will almost certainly be far less ambitious than the several plans that have been proposed in Congress. Moreover, in the context

of U.S.-Canada relations, the selection of any option would still constitute only one of two negotiating positions in resumed bilateral discussions.

Apart from the physical damage which may have resulted from lengthy delays in initiating remedial action on acid rain, what has the prolonged dispute done for the future of bilateral cooperation between the United States and Canada generally, and especially on environmental matters? One would hope that the handling of acid precipitation will be seen ultimately as an anomaly, perhaps partially a result of the financial implications of remedial action (especially for a just-now-recovering American economy) and partially a result of the political tenor of this particular U.S. Administration – which has not generally been regarded as one strongly committed to environmental priorities. Certainly the positions adopted by various Democratic contenders would lend some support to the view that one should not necessarily extrapolate the recent experience on bilateral environmental concerns to future Administrations of different political stripes.

Whether an anomaly or not, the problem of acid rain at least serves to demonstrate, where vital state interests are involved, the fragility of even long-established understandings on how bilateral disputes should be managed. Thus, in retrospect, although many observers have noted that the International Joint Commission might easily have filled a coordinating role with respect to acid rain similar to that taken in the Great Lakes Water Quality Agreements, it may be fortunate that the issue was handled in another forum. If it is accepted that political intervention was inevitable in the acid rain debate, better to have politicized and tainted an *ad hoc* process than to have seriously damaged the credibility of a respected standing body which must continue to address a range of problems relating to shared resources.

J. Owen Saunders

## Regulatory Boards Seminar

The Institute is holding a one-day Seminar on regulatory boards and the oil and gas industry in Alberta on Thursday, March 15, 1984 at The University of Calgary.

Every phase of the oil and gas industry in Alberta is regulated by Boards or tribunals, most significantly the Energy Resources Conservation Board, the Public Utilities Board, the Surface Rights Board, the Alberta Petroleum Marketing Commission, and the National Energy Board. Each Board administers complex statutes which have tremendous influence on the day-to-day activities of the industry.

The Seminar will be an intensive teaching session designed to provide a working guide to the complexities of this regulatory scheme. It will primarily be of interest to lawyers in industry and private practice who require an introduction to this area of administrative process. Because the focus of the Seminar will be on the substantive jurisdiction of the various Boards rather than on procedure, it will also be useful to other non-legal personnel involved in the preparation of regulatory applications.

A collection of materials will be made available to participants and will include relevant statutory provisions, judicial cases,

board decisions, and information letters.

The Seminar will be conducted by three members of the Institute staff, all of whom teach in the Faculty of Law at The University of Calgary.

The Seminar fee is \$160/registrant (includes full seminar, materials, and luncheon). Further details and registration forms are available from Shirley Babcock at 282-9197.

## Natural Resources Law Essay Prize

To encourage student legal research, the Institute is pleased to announce the creation of an annual essay prize in the amount of \$1,000.00. The prize will be awarded for the best paper on any aspect of natural resources law and is open to all law students at Canadian universities. The award will be presented only if a paper merits it. The selected essay will normally be published by the Institute.

Papers should be submitted to the Selection Committee, Canadian Institute of Resources Law, by June 30 of the year of application.

## Publications

- Resources Law Bibliography.**  
1980. ISBN 0-919269-01-X. 537 p. \$19.95
- Environmental Regulation - Its Impact on Major Oil and Gas Projects: Oil Sands and Arctic,** by C.D. Hunt and A.R. Lucas.  
1980. ISBN 0-919269-001. 168 p. \$10.95
- A Guide to Appearing before the Surface Rights Board of Alberta,** by Laureen Ridsdel and Richard J. Bennett. Working Paper 1. 1982. ISBN 0-919269-04-4. 70 p. \$5.0
- Environmental Law in the 1980s: A New Beginning,** Proceedings of a Colloquium, The Banff Centre, November 27-29, 1981, Peter Z.R. Finkle and Alastair R. Lucas, eds. Proceedings 1. ISBN 0-919269-05-2. 233 p. \$13.50
- Petroleum Operations on the Canadian Continental Margin - The Legal Issues in a Modern Perspective,** by Ian Townsend Gault. Canadian Continental Shelf Law 1; Working Paper 2. 1983. ISBN 0-919269-05-2. 113 p. \$8.00
- Acid Precipitation in North America: The Case for Transboundary Cooperation,** by Douglas M. Johnston and Peter Finkle. 1983. ISBN 0-919269-02-8. 75 p. \$8.00
- The International Legal Context of Petroleum Operations in Arctic Waters,** by Ian Townsend Gault. Canadian Continental Shelf Law 2; Working Paper 4. 1983. ISBN 0-919269-10-9. 76 p. \$7.00
- Canadian Electricity Exports: Legal and Regulatory Issues,** by Alastair R. Lucas and J. Owen Saunders, Working Paper 3, 1983. ISBN 0-919269-09-5. 40 p. \$7.50
- Resources: The Newsletter of the Canadian Institute of Resources Law.** ISSN 0714-5918. Occasional free

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