

*The Newsletter of the Canadian Institute of Resources Law*

## THE NRCB'S WEST CASTLE DECISION: SUSTAINABLE DEVELOPMENT DECISION-MAKING IN PRACTICE

by *Steven Kennett\**

### Introduction

The Brundtland report's concept of "sustainable development"<sup>1</sup> fundamentally altered the language of the debate over environment and economy. Rapidly accepted by political, business, and environmental leaders in Canada,<sup>2</sup> it has since been interpreted to support everything from a business-as-usual approach to an uncompromising opposition to a broad range of economic activity. Similarly, terms such as "ecosystem management" and "cumulative effects assessment" have gained considerable currency, without general agreement on their precise definitions and implications.

While the rhetoric has clearly changed in recent years, the reality is more constant. Engaging as they may be at a theoretical level, these conceptual developments must ultimately be judged in terms of their practical application. Their impact on decision-making is what counts, not the frequency of their recitation in

glossy brochures published by governments, environmentalists, or businesses.

This article argues that the Natural Resources Conservation Board (NRCB) of Alberta has recently shown that these concepts do matter, and that they can be applied in a concrete and balanced way to the real-world decisions that will ultimately determine our economic and environmental future. The NRCB's West Castle decision<sup>3</sup> is a model for deciding complex and controversial development applications involving

multiple parties and interests, and raising important issues of natural resource management and land use planning. Both the NRCB process and the substance of the decision could have far-reaching application to many difficult environmental and resource management issues currently facing Canadians.

### The Application and Public Hearings

The West Castle decision concerned an application for a major recreation and tourism development on the site

### Résumé

Le présent article examine la décision rendue récemment par le conseil de la conservation des ressources naturelles de l'Alberta, à l'égard d'une demande en vue de la construction d'un important centre de villégiature quatre-saisons dans la vallée de West Castle, à proximité de Pincher Creek (Alberta). L'article fait état de quatre aspects de la décision rendue. Le premier aspect est celui de l'interprétation de l'évaluation de l'"intérêt public", ou plus précisément de l'acceptation, de la part du conseil, de l'évaluation des effets cumulatifs, de la perspective d'un écosystème et de l'objectif du développement durable. Deuxièmement, la décision démontre dans quelle mesure

l'analyse des politiques, au sens large, et les recommandations peuvent (et doivent) faire partie du traitement de demandes précises. La décision présente, en troisième lieu, un compromis novateur selon lequel les intérêts des protagonistes de l'audience convergent vers un même résultat. Enfin, la décision laisse entendre qu'il faudra mieux gérer les ressources naturelles et formuler des politiques d'utilisation des terres plus efficaces afin de pouvoir offrir un cadre plus structuré pour le processus d'étude de projet. L'article avance que la décision de West Castle marque un point tournant dans la prise de décisions en matière de développement durable.

### Inside

**Recent Developments in  
Canadian Oil and Gas Law  
(Page 6)**

of an existing ski facility in the West Castle Valley, near Pincher Creek, Alberta.<sup>4</sup> The proposal was for a four-season resort, including expanded ski facilities with a capacity of 3,200 skiers per day, two 18-hole golf courses, and accommodation for up to 2,500 people. The location is a narrow valley in the north-eastern section of the Crown of the Continent, an ecologically significant and scenic area of Alberta, British Columbia, and Montana centred around Waterton Lakes (Canada) and Glacier (U.S.) national parks.

The project was promoted primarily on the basis of its economic and recreational benefits. Opponents argued that it would have serious negative effects on wildlife in the West Castle valley and throughout the whole Crown ecosystem.

### The Decision

The NRCB has authority, with prior Cabinet authorization, to grant project approval on any terms and conditions that it considers appropriate. It can also refuse to grant approval, defer consideration of the application, or make any other disposition of the application that it considers to be appropriate. The Board phrased its decision on the West Castle application as a conditional approval of the project. It also noted, however, that "Unless certain conditions or contingencies are met, the Board does not believe ... that the project as proposed is in the public interest" (p. 12-12). Participants and commentators are thus left to argue whether the glass is half full, or half empty.

While the Board's wording has the advantage of offering something to everyone, the decision is perhaps most accurately characterized as a rejection of the application as submitted, and a prospective approval of a modified project under clearly specified circumstances.

The Board's rejection of the application was based on two conclusions:

(1) the project design was inappropriate on environmental grounds; and  
(2) a development of this magnitude in this location is unacceptable in the context of current land management arrangements because of the significant existing pressures on the Crown of the Continent ecosystem.

On each of these issues, the NRCB specified conditions under which a development in the West Castle Valley would be acceptable.

First, any project of the type proposed must be designed to minimize environmental impacts. For example, golf courses should be downstream of the sensitive wetland area, and development restricted to one side of the valley.

Second, the Board specified that a significant area of land north of Waterton Lakes National Park and surrounding the proposed development "should be re-zoned on a more restrictive basis to appropriately mitigate the potentially significant adverse environmental impacts of the resort" (p. 10-18) The NRCB made its "approval" conditional on the creation of the Waterton-Castle Wildland Recreation Area (WCWRA), and included in its decision proposed boundaries, land use restrictions, and guidance regarding the WCWRA's management structure.

Four aspects of the West Castle decision warrant particular attention. The first is the interpretation of the "public interest" test -- and, notably the Board's acceptance and application of cumulative effects assessment, an ecosystem perspective, and the objective of sustainable development. Second, the decision demonstrates how broad policy analysis and recommendations can (and should) be included in the disposition of specific applications. Third, it presents an innovative compromise position, moving the principal protagonists in the hearing

some way towards a convergence of interests. Finally, the decision suggests the need for improved natural resource management and land-use policies to provide a more developed framework within which the project review process can operate.

### Public Interest

The NRCB was created "to provide for an impartial process to review projects that will or may affect the natural resources of Alberta in order to determine whether, in the Board's opinion, the projects are in the public interest, having regard to the social and economic effects of the projects and the effects of the projects on the environment."<sup>5</sup> This extraordinarily broad mandate to determine the public interest is reflected in the scope of the Board's decision, which included consideration of:

"project justification, viability and capability of the Applicant to implement the project; project location, configuration, and alternatives; and cumulative effects, ecosystem importance, and sustainable development" (p. 5-1).

The decision also presents a detailed examination of utilities and geotechnical issues as well as an extensive discussion of the project's social, economic, and environmental effects. Sections on impact mitigation through land use controls and the ongoing management of the proposed WCWRA are also included. While all of these sections warrant careful review, this article focuses on the environmental and resource management aspects of the decision.

The scope of the public interest test in the West Castle decision clearly places the NRCB on the forefront of environmental assessment practice. Of particular importance are the Board's use of cumulative effects assessment, its ecosystem perspective, and its application of the principle of sustainable development to the issues before it.

### **(1) Cumulative Effects Assessment (CEA)**

The NRCB's commitment to CEA was already on record, notably in its decision on the Three Sisters application for a recreational development in the Bow Valley near Canmore.<sup>6</sup> In the West Castle decision, the Board reiterated "that it is important to address developments in terms of the carrying capacity of the environment, as well as the additional impacts a project would have on existing conditions" (p. 5-20). The Board has adopted an "adaptive" approach to CEA, focusing its information collection and analysis on effects that it believes to be non-trivial and of public concern, two characteristics directly relevant to the public interest test.<sup>7</sup> The NRCB applied CEA not only to environmental issues, but also to its social and economic analyses.<sup>8</sup> Thus, while CEA is the subject of debate and extensive methodological investigation in some quarters, the NRCB has already entrenched it firmly in project decision-making.

### **(2) Ecosystem Approach**

The application of CEA is inseparable from the Board's ecosystem perspective on project review. While recognizing that ecosystems are "convenient artifices" (p. 9-70), the Board clearly indicated its concern with "the interrelationship between the 'footprint' of the proposed resort, the immediately adjacent lands, and the surrounding ecosystem" (p. 10-18). It explained the link between cumulative effects, the ecosystem approach and its definition of the relevant region for investigation of impacts as follows:

"Because societies, economies and ecosystems incorporate many components that are inter-related in a complex manner, the potential social, economic, and environmental impacts of a project cannot be understood by considering only the effects of the project on its immediate locale. Projects have a wider impact and must be considered in light of the 'baseline' or background condition of the society, economy and

environment of the regions in which the projects have significant impacts. In some cases such regions will be transjurisdictional" (p. 5-21).

The ecosystem approach led the Board to consider the project's implications for the Crown of the Continent region, with particular attention to the Waterton-Castle area north of Waterton Lakes National Park and West of Pincher Creek. On the evidence before it, the Board concluded that:

"the state of the Crown of the Continent Ecosystem is at risk of further deterioration if the level of use continues to increase. It may be at risk even if the present level of use continues" (p. 9-73). This finding of risk to ecosystem integrity was a principal determinant of the Board's decision.

### **(3) Sustainable Development**

The adoption of "sustainable development" as a specific public interest criterion also illustrates the NRCB's willingness to apply new approaches to environmental management in the context of real-world decisions. The Board's position is that "the sustainability of ecosystems is the proper frame of reference when assessing environmental impacts" (p. 5-20) and it emphasized "the very fundamental links between the state of the environment, long-term economic viability and welfare of society" (p. 5-21). The Board's conclusion was that "the ecological resources of the [Waterton-Castle] area may not be sustainable even with existing use, to say nothing of the risk to these resources if a permanent development were placed in the area along with uncontrolled existing uses" (p. 5-21).

Furthermore, the decision explicitly recognized the practical implications of sustainable development for land and natural resource use. The Board stated its belief

"that sustainable development may not be achievable unless integrated resource management is understood to mean that uses may be permitted, but in more

discrete areas than have been available in the past; i.e., that certain areas may be designated for certain land uses only and other uses may be prohibited in the same areas in order to protect the natural resource" (p. 10-11).

The West Castle decision, therefore, recognizes that project applications cannot be viewed in isolation, and that sound decision-making will necessarily take the broader ecological, economic, social, land-use planning and regulatory contexts into account.

### **Land-use Management and Project Review**

The Board's interpretation of its public interest mandate made consideration of "land use planning and ongoing management structures" for the Crown area an integral part of the West Castle decision (p. 4-3). It clearly felt that these issues must be addressed if a major project, located in an environmentally sensitive area, is to be consistent with the principle of sustainable development. The outcome was its proposal for the WCWRA.

This aspect of the decision raises an important question. Did the NRCB stray too far into policy-making, essentially devising a new and comprehensive land-use regime for a significant portion of the Crown region on the basis of an application for a single project? The issue can be stated more strongly, since it could be argued that individuals and groups for whom the project itself appeared insignificant, and certainly not worth the time and cost of intervention in the hearing, now find themselves facing a recommendation for significant changes in land management and permitted uses over a broad area. For example, the Board's proposed guidelines for the WCWRA list motorized vehicle use as a prohibited activity, a matter of obvious concern for four wheel drive or snowmobile enthusiasts.

There are three responses to the argument that the land-use policy

aspects of the Board's decision, notably the WCWRA recommendation, are inappropriate in the context of decision-making on a project application and that they adversely affect interested parties without providing an adequate opportunity for input.

First, the appropriateness of the Board's intervention into land management issues must be judged in part on the quality of the decision-making process itself. On this standard, the NRCB process and the West Castle decision clearly score high marks. A wide range of technical evidence and stakeholder points of view were presented to an independent and expert tribunal in a public forum. Economic, social, environmental, and technical aspects of the proposal were examined. Participants included organized groups, government agencies, and individual citizens, and cross-examination was permitted to test both fact and argument. Written submissions were also considered. Finally, the Board presented a detailed and carefully reasoned decision, showing that it had directed its attention to the full range of interests and arguments. Few other instances of decision-making on matters of public policy could match these claims.

Second, it is clearly erroneous to characterize the West Castle decision as an attempt to appropriate a broad policy-making function. The Board simply found that the project, as proposed, was not in the public interest; it then suggested that a modified project could be acceptable in the context of a general management regime and strengthened land use controls that would ensure the coherent and sustainable management of the Crown ecosystem. The details of the management regime that the Board deemed to be necessary, in light of the project's impacts and the overall state of the Crown ecosystem, are then set out. While a very useful

contribution to debate on the broader land use issues, the decision is in no way preemptive. The NRCB's approach is solidly grounded in its mandate and the issues before it; the Board could not, and did not, create a new land management regime for the Castle-Crown area. The field remains open for the government, the proponent, and other interested parties to work out their priorities and to decide whether the package of the WCWRA and the modified development is preferable to the status quo.

The third response to the argument that this aspect of the decision is inappropriate draws on the logic of the concepts discussed above: CEA, ecosystem management, and sustainable development. To be more than meaningless abstractions, these concepts must be applied to decision-making in cases like the West Castle application. The unavoidable implication is that the approval process must include consideration of broader issues, as was done by the NRCB in its review of land management practices and its WCWRA proposal.

### **Towards Common Interests**

A frequent criticism of the adversarial public hearing process is that it fosters an atmosphere of confrontation rather than compromise. While there is no doubt that the West Castle application was hotly contested, the decision itself is significant in its innovative approach to reconciling competing interests. The WCWRA proposal creates possible common ground between the project proponents and its opponents.

Environmentalists who opposed the project have as their broader objective the improved management and greater protection of the Crown ecosystem. The WCWRA suggested by the NRCB would constitute a major step in that direction. In strategic terms, then, acceptance of the modified development may be seen by some as a small price to pay for

achieving the broader goal embodied in the WCWRA.

The proponent's objective is a more limited one of receiving approval for the resort development in a form that meets basic business requirements. If final approval requires establishment of the WCWRA, then the proponent would appear to have good reason to lend its support. The WCWRA has no serious down side to the proposed development, and in fact the resort's attractiveness to certain users may be enhanced by its proximity to a significant wildland recreation area. The Board's decision, following an adversarial hearing, thus structures the conditional approval in a way that creates a common interest among the proponent and the environmental intervenors opposed to the project.

This outcome illustrates significant advantages of the NRCB process. In fashioning the conditional approval package, the NRCB clearly demonstrates that public hearings before expert and independent decision-makers can produce a creative and credible assessment of the public interest. The result offers significant potential net gains to many parties, while ensuring that there will be no degradation of the status quo position. Furthermore, the independence of the Board from direct political pressures lends important legitimacy to the compromise position that it developed. Despite the fact that this position meets many of the basic objectives of both the project proponent and the environmental intervenors, it is at best unclear whether the more traditional processes of political and bureaucratic lobbying would have led to the same outcome.

### **Land-use Policy Context for the NRCB Process**

The final issue raised by the West Castle decision concerns the general policy framework for land and resource management. An inadequate framework makes the Board's decision-making task more difficult

and increases the uncertainty with which applicants and intervenors must contend. If Alberta is to improve its land and resource management processes, promote sustainable development, and build on the impressive and internationally-respected records of its quasi-judicial tribunals (both the Energy Resources Conservation Board (ERCB) and the NRCB), steps should be taken to develop further the policy and planning framework within which the approval process operates.

In particular, the broader issues of ecosystem management that so substantially influenced the NRCB's West Castle decision should be addressed in a comprehensive and proactive way. The Board detailed the progressive degradation of the Crown ecosystem, highlighting problems arising from unsustainable land use and the fragmentation of jurisdictional authority. While the pressures on the Crown ecosystem identified in the decision have rarely been presented in such a clear and coherent manner and from such an authoritative source, these issues have been widely recognized for some time.

Had governments taken serious initiatives to address them prior to the West Castle application, the issues before the Board could have been more narrowly defined, and the applicant and intervenors would have had a clearer understanding from the outset of the parameters for decision-making. Increasing the effectiveness and efficiency of project decision-making cannot be achieved by ignoring these broader questions; rather, they should be addressed explicitly through an open policy process, which can then establish a framework for the consideration of individual projects by the NRCB.

### Conclusion

The NRCB's decision on the West Castle application is a landmark in four respects. First, it provides a well reasoned and creative solution to a

contentious dispute that raised complex economic, social, and environmental issues. From the detailed mitigation measures and requirements of project re-design, to the recommendation of comprehensive and sustainable land-use management in the form of the WCWRA, the Board demonstrated an impressive command of the issues before it and the range of alternatives available to give effect to its public interest mandate.

Second, the vision for the Crown of the Continent outlined in the decision is a compelling one. It recognizes economic, recreational, scenic and ecological values of the region, and makes the case that they must be managed in a coordinated way if they are all to be respected. The Board's analysis of the issues raised by the application, and its recommendation of an improved land and resource management regime for the Crown ecosystem, should provide valuable direction for achieving sustainable development in that region regardless of whether or not the project under consideration is ever built.

Third, the decision underlines the strengths of the NRCB process in general, and the Board's application of CEA, ecosystem analysis, and the principle of sustainable development in particular. The West Castle decision illustrates the integrative analysis that is required to assess the implications and acceptability of projects which raise important resource management and land use issues.

Finally, the West Castle decision suggests the need for proactive and comprehensive land use planning to provide a more developed policy framework for the project approval process. The NRCB has identified deficiencies in this respect in both the West Castle and Three Sisters decisions. Rather than waiting for individual project applications to reveal these defects, initiatives should be taken to improve the management

of environmentally sensitive areas such as the Crown of the Continent, the Eastern Slopes of the Rocky Mountains, and the Bow Valley.

In the current review of regulatory processes in Alberta, the significant strengths of the NRCB should be recognized and reinforced so that it can continue to evolve to meet the needs of Albertans. The West Castle decision confirms the NRCB as a model for sustainable development decision-making. Any retreat from that model or weakening of the Board would be a serious retrograde step for natural resources management and environmental policy in Alberta.

*\*Steven Kennett is a Research Associate at the Canadian Institute of Resources Law.*

### Notes

1. World Commission on Environment and Development, Our Common Future (Oxford: Oxford University Press, 1987) p. 8.

2. For example, Report of the National Task Force on Environment and Economy (Submitted to The Canadian Council of Resource and Environment Ministers, September 24, 1987).

3. K.R. Smith, G.A. Yarranton, C.H. Weir & C. Dahl Rees, Application to Construct Recreational and Tourism Facilities in the West Castle Valley, near Pincher Creek Alberta, NRCB Decision Report #9201, December, 1993. References to page and section numbers in the text are to this Decision Report.

4. The application was considered at a public hearing at Pincher Creek between June 21 and July 19, 1993. Eighty-six intervenors participated, representing a wide range of interests and positions. The Board's decision was released on December 20, 1993.

5. Natural Resources Conservation Board Act, S.A. 1990, c. N-5.5, s. 2.

6. G.J. DeSourcy, G.A. Yarranton, C.H. Weir & C. Dahl Rees. Application to Construct a Recreational and Tourism Project in the Town of Canmore, Alberta, NRCB Decision Report # 9103, November, 1992, pp. 5-2 - 5-4.

7. G.A. Yarranton & G.L. Hegmann, "A Decision-Maker's View of Cumulative Effects Assessment," presented at the Conference on Cumulative Effects Assessment in Canada: From Concept to Practice, April 13-14, 1994, Calgary, Alberta (Environmental Research Centre Discussion Paper, The University of Calgary) p. 3.

8. Ibid., pp. 4-5.

# Recent Developments in Canadian Oil and Gas Law

by Susan Blackman\*

(reprinted with permission from the Rocky Mountain Mineral Law Foundation Newsletter)

## Oil and Gas

### Gas unit agreement – Definitions of "petroleum" and "oil" – Whether solution gas is included in the agreement

A gas unit agreement covered "petroleum" which was defined to exclude "oil". "Oil" was defined to mean oil and all other hydrocarbons "that can be recovered in liquid form through a well by ordinary crude oil production methods." The defendant had been producing the solution gas along with the oil from the formation covered by the gas unit agreement. Solution gas is dissolved in the oil and is therefore liquid in the reservoir, but it vaporizes as it is brought to the surface and, therefore, emerges in its gaseous state. The trial judge held that the solution gas was included in the gas unit agreement (see *Prism Petroleum Ltd. v. Omega Hydrocarbons Ltd.*, reported in vol. IX, No. 3 of this *Newsletter*).

On appeal, Stratton J.A., for the Court, considered that the trial judgement resulted in the word "recovered" meaning the same as the word "produced". Stratton J.A. preferred to distinguish these two terms and, following *Borys v. C.P.R.*, [1953] A.C. 217, he held that the term "recovery" refers to the state of the hydrocarbons in the reservoir (i.e., at the bottom of the well-bore) whereas "produced" refers to the state of the hydrocarbons at the surface. Thus, the solution gas was included with the oil. This result is in agreement with United States case law in which solution gas has also been included with oil. See *Prism Petroleum Ltd. v. Omega*

*Hydrocarbons Ltd.*, [1994] A.J. No. 255 (C.A.) (QL).

### Offshore oil and gas -- Implementation of Atlantic Accord -- Declaration of significant discovery

In 1986, Mobil obtained a declaration of significant discovery (SDD) for an area offshore of Newfoundland on the basis of the Nautilus C-92 well. A SDD permits the holder of an exploration licence to proceed to production. The governing legislation was the *Canadian Oil and Gas Act (COGA)*, S.C. 1980-81-82-83, c.81, since repealed. Mobil was dissatisfied with the areal extent of the declaration and protested the decision unsuccessfully. The relevant area then came under the Atlantic Accord. In the implementing legislation, COGA SDDs were expressly stated to be continued under the new legislation. In 1990, Mobil applied to the Canada-Newfoundland Offshore Petroleum Board for another SDD of a larger area but also based on the Nautilus C-92 well. The main issue for the court was whether one well can support more than one SDD.

The court held that each SDD needs a new well and is based on only one well. This conclusion relies on the definition of significant discovery ("... a discovery indicated by the first well on a geological feature ..."), on the whole legislative scheme, and on the similar provisions in COGA. See *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] S.C.J. No. 14 (QL).

### Offshore oil and gas -- Implementation of Atlantic Accord -- Administrative law -- Whether rejection of an application for declaration of significant discovery requires hearing by offshore board

Mobil applied to the Canada-Newfoundland Offshore Petroleum Board for a declaration of significant discovery (SDD) and pointed out it

wished to make arguments on a new legal issue of whether one well could support more than one SDD. The chairman of the Board rejected Mobil's application and refused to hear the argument. An exchange of correspondence resulted and Mobil then took legal action.

The Court held there was no interference with Mobil's vested interests such as might require a full oral hearing. However, the Board's rejection of Mobil's application was a decision of a "final nature" since it left Mobil unable to obtain production rights and forced it to sit by and watch its exploration licence expire. Also, there was some question of whether the Board properly delegated its decision-making authority to its Chairman. The court held that Mobil was entitled to a full hearing, at the least, a "written hearing". See *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] S.C.J. No. 14 (QL).

### Joint operating agreement -- Fiduciary duty of operator -- Requirements imposed on fiduciary with respect to well-drilling procedures

S-R and PP had a joint operating agreement for lands under which S-R was the operator. One shut-in well on the lands had showed promise of gas present, possibly in commercial quantities. S-R proposed to re-complete the well and test for gas and PP signed the required AFE. S-R was at the time working towards making a bid for neighbouring lands. S-R did the work specified in the AFE, but went further than the AFE and tested a lower formation for oil. Although gas was eventually obtained in commercial quantities, the well ultimately flooded and had to be shut-in again. PP sued claiming that S-R breached its fiduciary duty as operator and caused the well to be flooded.

The judge held that courts should be reluctant to impose fiduciary obligations where well-drilling procedures are concerned. However, in this case, the unauthorized testing done was such as to convert the procedure from a re-completion project to a project equivalent to drilling a new well. Thus, the material risks of the project were significantly altered and S-R breached its fiduciary obligation.

Mason J. held that the fiduciary duty imposed on S-R had three components: 1) full disclosure, 2) adherence to the instructions of the beneficiary, and 3) not using the fiduciary's discretion and power for personal gain. In this case, firstly, the evidence showed S-R did not fully disclose to PP its activities during the re-completion in spite of PP's repeated requests. Secondly, the testing went beyond that authorized by PP in the AFE. Thirdly, S-R used the test results in an attempt to obtain the rights to neighbouring lands.

The remedy granted in this case was not what might be expected from earlier case law. Mason J. held that the test for the quantum of damages does not require foreseeability of harm but does require causation. In this case, the expert evidence was conflicting on whether the unauthorized testing caused the flooding, therefore, causation could not be shown. Mason J. awarded PP damages equal to what it had paid to S-R for the "re-completion". See *Prairie Pacific Energy Corp. v. Scurry-Rainbow Oil Ltd.* (1994), 147 A.R. 260 (Q.B.).

#### **Pooling -- Areal vs reservoir-based**

M sold its interests to A in return for a royalty of 12.5% of the gas and oil produced and marketed from the lands. In the agreement, A was given the right to pool or unitize any of the lands. In 1980, A drilled a successful gas well on part of the lands, the south half of a section. It pooled that half section with the north half of the section which it owned outright and assigned the proceeds of production to the two halves based on surface area.

In Alberta, a one section gas spacing unit is stipulated by regulation for production, therefore, pooling was necessary. The trial judge held that the gas reservoir underlay entirely or substantially the south half of the section and agreed with M that A should have used reserves-based pooling. The Court of Appeal held that the agreement created expectations in the parties that were determined in part by the commercial context and practice in the industry. The practice at the time was that reserves-based pooling was used where the reservoir was delineated sufficiently.

The practice of the Alberta Energy Resources Conservation Board in compulsory pooling applications was discussed. The Court concluded that the Board places the burden of proof in such cases on the party claiming that areal pooling is inequitable and decides the case on a balance of probabilities. In this case, all the evidence pointed to the reservoir lying under the southern half. Reserves-based pooling would have been expected under these circumstances and the trial judgement was upheld. See *Mesa Operating Ltd. v. Amoco Canada Resources Ltd.*, [1994] A.J. No. 201 (C.A.) (QL).

#### **Royalties -- Royalty payable by working interest owner -- Whether payable during penalty period applied when working interest owner does not participate in a well**

Normally, under a joint operating agreement, a working interest owner can refuse to participate in the drilling of a well, but if the well proves productive, the non-participating party does not receive any of the proceeds of the well until a penalty period has expired. M had an agreement with A under which M was entitled to a 12.5% royalty payable on the "proceeds received by [A]". A was a working interest owner on some lands subject to the royalty. A chose not to participate in several wells that ultimately proved productive. M claimed that A was liable for royalties payable on the proceeds that A would

have received during the penalty period had it participated. The Court held that, as the overriding royalty was carved out of the working interest, the "fortunes of [the] royalty holder track those of the working interest holder" (para. 46). No royalty was payable during the penalty period because no proceeds of production were actually received by A. See *Mesa Operating Ltd. v. Amoco Canada Resources Ltd.*, [1994] A.J. No. 201 (C.A.) (QL).

#### **National Energy Board -- Environmental review of facilities for production of gas exports**

The Supreme Court of Canada has ruled that the *National Energy Board Act*, R.S.C. 1985, c.N-7, confers jurisdiction on the National Energy Board to review the environmental aspects of facilities built to produce electricity for export. The decision rests on the broad definition in the Act of "export" as applied to electricity. The definition of "export" as applied to gas may be at least as broad, so the Board may also have jurisdiction to review the environmental aspects of gas production facilities. In March 1994, the Board responded to this judgement by initiating a review of its latest gas export licence decisions to consider the effect of the judgement. See *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] S.C.J. No. 13 and Canada, National Energy Board, News Release 94/13, 15 March 1994.

#### **Mining**

##### **Royalties as Interests in Land -- Net Smelter Return Royalty -- Nova Scotia**

F granted to C a right to earn a 100% working interest in mineral claims in return for a 5% "Net Smelter Return Royalty". The royalty was transferred to other parties and the Trustee in Bankruptcy of C wished to sell the mineral interests free of the royalties. The judge held that a "Net Smelter Return Royalty" refers to the minerals after

production and not the minerals *in situ*. Thus, the royalty interests were contractual only and could not be transferred to the other parties. See *Nova Scotia Business Capital Corp. v. Coxheath Gold Holdings Ltd.*, [1993] N.S.J. No. 517 (S.C.) (QL).

### **Claim Staking -- Substantial Compliance -- British Columbia**

In British Columbia, although one legal corner post may serve for four 4-post claims, it is completely insufficient for a valid staking where no boundaries are marked, corner posts either are not set or are set improperly, and there is no excuse such as topography to prevent the proper marking. Although an issue was raised as to whether snow conditions can be included in "prevailing topographical conditions" as an excuse for staking, the judge merely expressed the possibility that a heavy annual snowpack might be included. In this case, the weather was not in fact a problem. See *Schomig v. Dupras*, [1994] B.C.J. No. 17 (S.C.) (QL) and Mineral Tenure Act Regulation, B.C. Reg. 297/88, ss.2 and 3.

### **Dispute Settlement Procedures -- Standing of complainants to bring dispute before Chief Gold Commissioner -- British Columbia**

An issue as to standing was raised on an appeal to the British Columbia Supreme Court of a decision by the Chief Gold Commissioner cancelling claims. The judge held that an appellate tribunal may consider an issue raised before it for the first time if it is clear that no additional evidence on the point could have been lead before the original tribunal.

The complainants had staked claims with the intention of overstaking two existing claims. They had then discovered their claims might be too far north and they applied to abandon and relocate the claims,

which was done. The judge held that their interest flowed from the time of staking of the original claims since they had an exclusive right under the statute to abandon and relocate the claims within a prescribed time. The judge also noted that, although a complaint must be instigated by a person who has an interest, the Chief Gold Commissioner does not suddenly lose his jurisdiction over the dispute if the complainant loses his interest. Finally, the judge held that "it would place too high a burden on a complainant if he or she had to prove conclusively that his or her claim overlapped the claim about which the complaint is lodged" (para. 27). The Commissioner need only accept that there is an "apparent conflicting interest" over the same ground. See *Schomig v. Dupras*, [1994] B.C.J. No. 17 (S.C.) (QL).

\* *Susan Blackman is a Research Associate with the Canadian Institute of Resources Law and is the Canadian oil and gas and mining law reporter for the Rocky Mountain Mineral Law Foundation Newsletter.*

## **Institute News**

### **New Board Member**

The Institute has a new Board Member effective November, 1993.

Edith M. Gillespie was appointed to the Institute's Board as the representative of the Law Society of Alberta. Ms. Gillespie is a partner at the Calgary law firm of Code Hunter where she practices in the area of natural resources and energy law. She is a member of the Canadian Petroleum Law Foundation and the law committee for the Canadian Association of Petroleum Producers.

Funding for the publication of *Resources* has been provided by the Canadian Petroleum Law Foundation.

## **Resources No. 46 Spring 1994**

*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 and to give information about Institute publications and programs. 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 5,500 subscribers throughout the world. (International Standard Serial Number 0714-5918) Editor: Nancy Money

**Canadian Institute of Resources Law**  
*Executive Director:* J. Owen Saunders  
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, PF-B, The University of Calgary, 2500 University Drive N.W. Calgary, Alberta T2N 1N4  
Telephone: (403) 220-3200  
Facsimile: (403) 282-6182

### **Board of Directors**

E. Hugh Gaudet (Chairman)  
W. James Hope-Ross (Vice-Chairman)  
Nigel Bankes  
John U. Bayly, Q.C.  
W. Gordon Brown, Q.C.  
Don D. Detomasi  
Edith M. Gillespie  
J. Gerald Godsoe, Q.C.  
The Hon. Constance D. Hunt  
Alastair R. Lucas  
Shellah Martin  
David Oulton  
David R. Percy  
J. Owen Saunders  
Judith Snider  
Donald E. Wakefield  
C. Kemm Yates