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Water Allocation: Emerging Problems

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It is a commonly held belief among Canadians, even in the relatively arid West, that the country is blessed with abundant water resources. In the past decade, the most publicized discussions of water policy have concerned the options for managing our "surplus" water. From time to time, for example, the sensitive issue has been raised whether Canadian water should be diverted across the border to the United States where, in contrast to Canada, the lack of water has become a matter of great concern in some regions. Even the discussion of the possibility of water exports has underlined for many people the impression that Canadian water supplies are plentiful.

In recent years, this comfortable myth has been disturbed by the intrusion of unpleasant reality. Reports have circulated of possible plans for a major diversion of water from the Mackenzie River system to southern Alberta, thus emphasizing that that region indeed suffers from a lack of water. The news media have shown an increasing concern for water problems in the West. At a less visible level, an objective assessment by Environment Canada has predicted that the future development of the Saskatchewan-Nelson River Basin, which serves the bulk of the population of the prairie provinces, "may be limited by its ability to supply water for its expanding and diverse activities which are continually consuming more of the available supply" (Canada Water Year Book, 1975 at 48). The image of abundant water resources may therefore be true for Canada as a whole, but southern Alberta and Saskatchewan face potential water shortages which are almost certain to arise before the end of the century.

Growing competition for water resources inevitably focuses attention upon the existing legal scheme under which rights to water are allocated. Lawyers may increasingly be faced with a client who seeks the right to consume water, but whose application to do so is denied by a government agency. Similarly, if there is insufficient water supply to satisfy existing users, lawyers may be faced with questions from users whose consumption is cut back by government order or who claim that another person is using water to which they are entitled. In resolving these and other questions, lawyers will discover that a substantial body of water law exists, that is largely in statutory form and goes far beyond the few reported cases, which are concerned primarily with drainage disputes between quarrelling farmers.

In the discussion that follows, Alberta water law is used by way of example, but it should be noted that similar problems can arise in Saskatchewan, Manitoba, and even British Columbia, where water allocation is a major concern in the dry regions. The water rights allocation systems of each of the jurisdictions share many common features.

The law of water allocation in Alberta is found in the Water Resources Act (R.S.A. 1980, c.W-5). Its function is best illustrated by its history. The original law of water rights in western Canada was derived from the riparian doctrine, which limited the right to use water to those who owned an interest in the banks of a watercourse and restricted even their use by the requirement that it must not perceptibly diminish the flow of the stream. This doctrine was obviously unsuited to the arid climate of the southern prairies, where irrigation was thought to be necessary for successful farming. Under the riparian doctrine, irrigation on a large scale would not be permitted, because of the large quantity of water it consumed and the fact that it would often be carried out upon lands which did not adjoin a watercourse. Political pressure from agricultural settlers resulted in the passage in 1894 of the Northwest Irrigation Act, which is the precursor of existing prairie water legislation.

The basic concept of the legislation was to vest the right to the use of all water in the Crown, which would then allocate water only to those who obtained a licence from the government. A licence could authorize the large-scale consumption of water and its use on non-riparian land. Under the statutory system, rights to use water therefore belonged to licensees, though riparian owners retained some rights to water for limited purposes. A second feature of the Act dealt with conflicts in water use in the event that there was insufficient water to satisfy the needs of all those who were entitled to it. In this situation, a rule of priority of time was borrowed from the western U.S., so that during a water shortage an earlier licensee was entitled to receive the entire quantity of water stipulated in the licence before a later licensee could receive any water at all.

The basic pattern of the Northwest Irrigation Act is repeated in the Alberta Water Resources Act and the legislation of the other prairie provinces, though of course it has changed in many respects in the almost ninety years since it was originally passed. However, water problems have also changed in that period. The concern of the 1890s was to secure an initial allocation of water rights in a growing

The opinions presented are those of the authors and do not necessarily reflect the views of the Institute.

agricultural economy, whereas at the present time the greatest need is to regulate competition for an increasingly scarce resource. The legislation, while it was an admirable response to the former problem, is inadequate to deal with the problems of the 1980s.

The shortcomings of the Act can be easily explained. Any scheme which allocates water rights according to the time at which the application for a licence is made, is open to the criticism that earlier uses of water are favoured at the expense of more recent uses. As long as there is sufficient water available, new users will not be deprived of water except during times of seasonal shortage, when the rules of priority of time will prevail. However, once a river basin becomes fully allocated, the possibility arises that a potentially important new use of water will be denied because the available supply is entirely taken up by existing users.

There are several possible responses to this problem. One solution is simply to increase supply, which is the goal of the various schemes that have been canvassed for transferring water from northern to southern Alberta. An alternative solution is to permit the transfer of water rights, or some portion of them, from the earlier, preferred uses to the new applicants. This option is especially attractive if it is felt that earlier users might not be entirely efficient in consuming the large quantities of water to which their licences often entitle them. At the present time, this alternative is blocked by the Act, which prohibits the transfer of water rights in most circumstances.

The prohibition against transfers arises out of s.23(2) of the Water Resources Act which specifies that all water licences are appurtenant to, and inseparable from, the land or undertaking in respect of which they are issued. This section suggests that a water licence can be obtained if the land or undertaking to which it is attached is purchased, but not otherwise; however, a new user may not wish to acquire the entire operation of an existing user or to carry out a project at the same location as an existing user.

The only significant exception to this prohibition against transfer is found in s.11, which creates some statutory priorities of water use: the domestic use of water has the highest priority, followed by municipal, irrigation and agricultural, industrial, water power and other uses. For all practical purposes, this list of priorities is virtually meaningless, but a little known section of the Act (s.11(4)) allows an applicant requiring water for a higher use on the list to expropriate a water right which has already been allocated for a purpose which is lower on the list of statutory priorities. The applicant then obtains the priority in time previously possessed by the expropriated right, so that its use of water is protected against intervening water rights. These provisions have rarely been employed because there is little need to obtain a water right by transfer if there is sufficient water available to enable an applicant to obtain a new licence. However, if in the future little unallocated water is available, it may be essential to make use of the transfer provisions in order to accommodate new uses of water. It will then be seen that the present scheme of s.11 makes little sense, because it is based on the assumption that certain water uses are always more important than others, regardless of the quantities of water they consume, the location of the use within the province, and the pattern of development in a particular area.

The result of the restrictions on transfer is that there is little incentive for older, preferred users of water to either conserve water (which they receive virtually free of charge) or to release it for the use of others. The administrators of the Act have recognized the dangers of this position and provide with a licence a form which purports to facilitate the transfer of water rights from existing uses to new uses. However, any transfers that are carried out by this means must be of highly questionable validity, as they appear to be directly prohibited by the terms of the Act.

The policy problems of water transfers are but one aspect of the difficulties posed by applying an Act, originally designed to facilitate irrigation, to the varied water uses of a developed province. As conflicts in water use increase, lawyers will discover the existence of transfer problems, together with many others which exist in our present legislation but which have gone unnoticed during the decades when water supply has generally been adequate.

Case Comment on *Tener* v. *The Queen* (1981) 23 B.C.L.R. 309 (B.C.S.C.); (1982) 34 B.C.L.R. 285 (B.C.C.A.)

The absence of constitutional protection for property rights means that legislation enacted by the Crown may vary, reduce, restrict, or confiscate private rights; even those conveyed by a prior Crown grant. Crown grantees are keenly interested in how far new legislation or legislative amendments may alter their vested interests. If the alteration amounts to an expropriation the Crown may be under a legal obligation to provide compensation by virtue of the governing statute, the Expropriation Act (R.S.B.C. 1979, c.117), or possibly the common law. The interplay between prior grants and new laws highlights, and is based upon, the Crown's dual capacity in contractual arrangements: as the steward of provincially owned natural resources the Crown may grant contractual or proprietary rights, but as the legislative body the Crown is supreme and possesses the power to abrogate such rights, even without compensation, if it does so expressly.

The issue of compensation for expropriated rights was raised in a recent decision from the British Columbia Court of Appeal, presently on appeal to the Supreme Court of Canada. In the case of *Tener* v. *The Queen,* the plaintiff staked mineral claims on certain Crown lands. The Crown retained the ownership of the surface of the claims but Tener had nonexclusive rights to use as much of the surface as was reasonably necessary to extract the minerals. Subsequently the Park Act (R.S.B.C. 1979, c.309) was introduced authorizing the Lieutenant Governor in Council to designate and reserve Crown lands for park purposes and to expropriate privately held lands if necessary. Compensation was to be based on provisions in the Highway Act (R.S.B.C. 1979, c.167). Some lands staked by the plaintiff were designated as park land and an amendment to the Park Act provided that mining activities within designated areas were prohibited unless a park use permit was obtained.

As the plaintiff was never granted a permit, his right to win and work was curtailed by the refusal of a permit. Tener argued that the refusal of the park use permit was an expropriation of his right to develop his mineral claim by denying him access to the surface of the land, thus rendering

his ownership rights worthless. He based his right to compensation on the terms of the Park Act and the Expropriation Act and claimed compensation for either the expropriation of, or injurious affection to, his claims. Injurious affection occurs when property is damaged or its value is reduced without actually being expropriated.

The trial judge held that his claims had neither been expropriated nor injuriously affected. The majority in the Court of Appeal agreed that there was no expropriation but held that the plaintiff was entitled to compensation under the Expropriation Act for injurious affection. They held that the provisions in the Park Act did not constitute a complete code on the issue of compensation but left room for the operation of the Expropriation Act. They also found that the Expropriation Act gave a substantive right to compensation; it did not merely set the procedure for enforcing rights granted under other statutes. The Court then made the necessary finding, required by the Expropriation Act, that the loss resulted from the "execution of works".

All judges rejected the submission that Tener's rights had been expropriated. The trial judge reasoned that there had been no compulsory acquisition as the refusal of the permit merely suspended his mineral and surface rights without confiscating them. He classified the power to grant or refuse a permit and the actual granting or refusal as matters of regulation, not expropriation. While a distinction can be drawn between regulatory and expropriatory powers, the trial judge failed to recognize that a *de facto* expropriation may result from the exercise of a regulatory power. A similarly narrow construction of what constitutes an expropriation was taken by the majority in the Court of Appeal. Mr. Justice Lambert held that as the Crown retained the ownership of the surface it acquired nothing from the refusal. This reflects two characteristics which are sometimes said to be essential to an expropriation: first, the legislation must affect the plaintiff's beneficial ownership and second, the Crown must acquire the rights in issue. In this case Tener owned only the mineral claims. As his title to the claims was unaffected by the refusal of the permit there was no expropriation in the narrow sense. A broader approach would have focussed on the effect the legislation had on the set of rights which made up the plaintiff's title: the right to extract and the right to surface access. The refusal of the park use permit abrogated the latter and effectively frustrated the former. This approach would widen Crown liability as statutory and regulatory amendments generally impose additional restrictions on rights granted rather than confiscate them outright.

Under the second requirement, provisions which merely divest grantees are not "takings" unless there is a correlative gain to the Crown. This gain is often nothing more than the power to regrant the confiscated rights. If this is the sole test of a gain then the Crown did in fact acquire nothing in this case. As Tener retained title to the claims, the Crown could not reopen the lands for location and grant the surface rights to another free miner. The Crown did not acquire the power to regrant surface rights for other purposes as it retained that power from the outset. But, while the Crown did not acquire rights of regrant, it did enjoy the benefit of designating land for public use as a park. If acquisition is a requisite element of an expropriation, a broader test is needed to fully protect the vested rights of interest holders.

Other Crown grantees will be pleased to see an award of compensation in this case but they should be cautious if they seek to draw analogies to their own situations. First, no broad principle of compensation for expropriated rights was established by this case. The emphasis on the finding that the Park Act was not a complete code on compensation means that each enactment must be judged on its own terms. Cases will therefore be decided on their own facts and this does not promote the degree of certainty required to forcefully negotiate with the government. Second, Tener's rights were not subject to the "compliance with laws" provision presently contained in most Crown grants. The subsequent statutory and regulatory amendments to the Acts were not incorporated as contractual terms but remained strictly legislative provisions. The Crown could not therefore argue that Tener consented to be bound by the present and future terms of the Mineral Act (R.S.B.C. 1979, c.259) and other relevant laws such as the Park Act. Unless the courts are prepared to limit the application of compliance clauses to truly regulatory, as opposed to confiscatory amendments, it will be difficult for affected interest holders to claim compensation. Lastly, the case does not address the issue of whether the plaintiff would have had a common law right to compensation. As it was (somewhat surprisingly) conceded at trial that no such right existed, it is unlikely that the Supreme Court will comment on its earlier decision in *Manitoba Fisheries* v. *The Queen* ((1979) 88 D.L.R. (3d) 462 (S.C.C.)). The terms of that decision suggest that a substantive right to compensation for expropriation may now form part of the Canadian common law. Clarification would have been welcome in light of the judicial tendency to restrict that case to its particular facts.

A finding that acquired rights receive limited protection means that it may be more expensive for governments to establish reserved areas such as park lands, recreational lands, and ecological or wildlife reserves. This finding does not, however, unduly restrict the government's freedom of executive action as the right to compensation can be expressly abrogated by legislation and this power will be used in cases where the benefits of withdrawing land from development outweigh the political consequences of expropriating rights without compensation.

Crown grantees may, however, be encouraged by the majority's belief in the entitlement to recompense when individual rights had been altered for the public benefit. To establish liability the Court had to by-pass many legal obstacles. The fact that they did so shows their commitment to compensation in this case. But the complex reasoning of the decision may allow the Supreme Court to sidestep the true issue of Crown liability for contractual variations by merely focussing upon the steps in the Court of Appeal's reasoning.

Sheilah L. Martin

Institute Opens New Offices

Although the Institute has been housed at The University of Calgary since its incorporation in September 1979, only recently has it acquired permanent office space in which to centrally locate its activities. The official opening of these premises, located on the 4th floor of the Biological Sciences Building, was held on Tuesday, December 2. In honour of

the occasion, Mr. John Ballem, Q.C., a well-known Calgary lawyer specializing in oil and gas law, presented a lecture on "Oil and Gas Under the New Constitution", to a capacity audience in the Moot Court Room at the Law School.

Mr. Ballem noted that the "Resources Amendment" section in the Constitution Act does not make sweeping changes in the respective powers of federal and provincial governments to deal with oil and gas. Provinces now have more extensive powers to regulate export of oil and gas to other provinces, but this is subject to "paramount" federal laws. Provinces are also prohibited from discriminating in export of oil and gas to other provinces, and Mr. Ballem sees this as a potentially important issue in the natural gas side of the industry, which has proposed discount prices to open new markets.

Provincial powers based on resource ownership to control and regulate oil and gas mega projects have been confirmed in the new constitution. Ballem suggested that these ownership powers place producer provinces in a good position to effectively control prices, even for natural gas exports to the United States.

New IBA Section on Energy Law

The Committee on Energy and Natural Resources Law (Committee O) of the International Bar Association becomes the Section on Energy and Natural Resources Law (SERL) effective January 1, 1983.

The Section aims to advance the development and understanding of the law as it affects oil, gas, coal, uranium, and other mineral and energy sources, both nationally and internationally, and to conduct programmes for the continuing education of IBA members and other lawyers concerned with natural resources law. It will continue to publish the full proceedings of its seminars, in addition to its own quarterly newssheet containing articles and reports on current energy and natural resources law in major resource countries, information on Section activities, and membership news.

The Section has also created an Academic Advisory Group comprised of Section members and others knowledgeable in the energy and natural resources field, with the objects of undertaking joint research projects and publications and providing for the exchange of lecturers and students.

Professor Alastair R. Lucas has been appointed to the Academic Advisory Group as the Institute's representative. Other organizations represented include the Centre for Petroleum and Mineral Law Studies at the University of Dundee, the Australian Mining and Petroleum Law Association, the Japan Energy Law Institute, the Law Association for Asia and the Western Pacific, the Scandinavian Institute of Maritime Law, the Institute of Public Law, Norway, and the Westwater Research Centre, British Columbia.

Publications

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.

Despite the fact that most environmental legislation is cast in terms of prohibition and penalty, it is apparent that management and negotiation is in fact, the essence of Canadian environmental law. However, it has been suggested that the line should be drawn at negotiating the basic legal environmental standards. There is little role for common law actions that were designed only to resolve disputes between individuals. There are major uncertainties and contradictions in the legal rights and duties of government and of citizens, and there is growing evidence that public concern about these problems is increasing.

Particular problems include the possibility that certain new doctrines such as the emergent concept of procedural "fairness" and the "strict liability" quasi criminal offence category (stated in the *Sault Ste. Marie* case), may be used by polluters to frustrate environmental law enforcement. Despite early promise, there is now widespread public concern about the fairness and effectiveness of environmental impact processes.

A major conclusion of the Colloquium is that redesign and rethinking of the legal framework for environmental decision-making is required. Legal rights, duties, and obligations of government in enforcement of environmental laws must be rendered more certain. The role of citizens in this process must also be clarified, and a greater public awareness of the techniques for environmental law enforcement must be achieved.

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 D. Ridsdel and Richard J. Bennett. Working Paper 1. 1982. ISBN 0-919269-04-4. 70 p. $5.00

Introduction to Oil and Gas Law, by Canadian Association of Petroleum Landmen and Canadian Institute of Resources Law. 1981. 300 p. $30.00

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