Resources
The Newsletter of the Canadian Institute of Resources Law

No. 6 October 1983

Preserving Canada's Agricultural Land Resources

by H. Ian Rounthwaite
Faculty of Law
The University of Calgary

One of the myths which many Canadians still believe is that Canada has an unlimited supply of agricultural land. However, a 1980 study by the Lands Directorate of Environment Canada provides some disturbing information which may have far reaching implications for resource policy planners, analysts, and lawyers. Of the 922 million hectares which make up the country's land base, only 45 million hectares or 4.9 percent of the total is capable of producing crops. In addition, only a fraction of this total is able to produce demanding crops such as corn, soybeans, and other vegetables. When it is realized that almost 60 percent of all Class 1-3 land is within 160 kilometers of the country's 23 largest cities, the conclusion that agricultural land in Canada is a finite resource that is dwindling becomes inescapable.

The need to maintain and enhance our agricultural land base has become a matter of national concern. The pressures on agricultural land come from diverse sources, and therefore will require diverse solutions to ensure its protection.

Many provinces have enacted legislation aimed directly at maintaining and expanding their agricultural lands. In 1973, the British Columbia legislature enacted the *Agricultural Land Commission Act* (S.B.C. 1973, c.46 as am., R.S.B.C. 1979, c.9) with the intention of preserving the best farmlands in the province. Section 7 of the Act directs that the objects of the Commission include the preservation of agricultural land and efforts which will establish and maintain farms in British Columbia. These objects are carried out by the preparation of land reserve plans by regional districts which are then submitted to the Commission for approval. If the Commission is of the opinion that the land reserve plan is compatible with the purposes of the Act, it may designate the agricultural land shown on the plan as an agricultural land reserve. Once land is brought within an agricultural land reserve, the manner in which it may be used is severely controlled. In essence, the land is frozen for agricultural usages unless, upon application to the Commission, it is removed from the reserve or permission is granted to use the land for other than farm use. It is interesting to note that the Act provided expressly that "land shall be deemed not to be taken or injuriously affected by reason of its designation as an agricultural land reserve" (s.26). As a result, approximately 4½ million hectares of land in British Columbia are within agricultural land reserves.

Legislation to protect agricultural land has also been enacted in the Province of Quebec. In 1978, *Loi sur la protection du territoire agricole* (S.Q. 1978, c.10) entered into force. This legislation applies to almost all of the less than 2 percent of the province's land which can support agriculture. Like B.C., the Quebec programme is administered by a commission, titled the "Commission de protection du territoire agricole du Quebec". In both provinces, the Commissions are empowered to order that violators of the legislation restore the land to a state fit for agriculture.

The provincial legislatures of Newfoundland and Manitoba have also been active recently in efforts to protect their agricultural land bases. In Newfoundland and Labrador, only some 100,000 hectares of land can support farming and the government is introducing land use legislation to protect this small area. In Manitoba, the government introduced *The Farm Lands Ownership Act* during the 2nd Session of the 32nd Legislature which received first reading on December 6, 1982. This Act attempts to protect farmland by ensuring that ownership of land outside a city, town, village, or hamlet remains in the hands of farmers as defined in the Act. Should ownership fall into the hands of a non-farmer or non-farming corporation, the Act requires divestiture to the extent that their aggregate interests in farmland do not exceed 10 acres. The administration and enforcement of the Act is the responsibility of The Manitoba Farm Lands Ownership Board. The Act confers extensive powers on the Court of Queen's Bench to deal with violations of the Act. In addition to maximum fines of $50,000, the Court can order the sale or other disposition of the interest in farm land and direct the manner in which any proceeds of sale are to be distributed. The Act also makes the officers and directors of corporate violators subject to fines not to exceed $50,000.

These are the only provinces which have legislated land use planning schemes in which agricultural uses are given the highest priority. Saskatchewan and Prince Edward Island, however, have experimented with "land banking" schemes which serve to indirectly result in the preservation of agricultural land. Prince Edward Island (P.E.I.) was the first to act in 1969 when the Land Development Corporation (LDC) was created to control the degree of non-resident

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

ownership of shoreline recreational properties and agricultural holdings. The primary emphasis of the P.E.I. programme has been to acquire land through the LDC as a buyer of last resort in instances where a resident purchaser did not step forward to acquire agricultural and shoreline recreational properties which came on the market. In conjunction with the activities of the LDC, the *Real Property Act* (R.S.P.E.I. 1974, c.R-4) was passed in 1972 and amended in 1974 so that all purchases of land in excess of 10 hectares or shore frontages greater than 100 meters in length by non-residents and resident corporations require the approval of the Lieutenant Governor in Council. Unfortunately, due to rising land prices and a shortage of funds, the influence of the LDC in preserving agricultural land in the province has been marginal only.

Saskatchewan began to acquire agricultural lands in the early 1970s in an attempt to facilitate the entry of young farmers into farming and ranching. Government-acquired land could be leased by farmers who then were able to acquire the land outright if certain conditions were fulfilled under the *Farm Purchase Program Act* (S.S. 1980, c.F-8.1). While there is no doubt that the land banking programme helped a number of farmers begin operations, many farmers in Saskatchewan viewed the government as another participant in the land market which tended to escalate prices. In any event, the Conservative government of Grant Devine moved quickly in 1982 and abolished provincial land banking by enacting the *Land Bank Repeal Act* (S.S. 1982-83, c.L-2.1).

Other provinces, such as Ontario and Alberta, have approached the problem of preserving their agricultural land resources by formulating policy statements and guidelines on agricultural land which are intended to influence the decision-making process of the regional and local land use planning authorities. In 1978, the Ontario government issued a policy statement on planning for agriculture. The *Food Land Guidelines* are to be used by provincial ministries and the Ontario Municipal Board when reviewing regional and municipal plans. Paragraph 1.7 of the *Guidelines* stipulates that,

> The Food Land Guidelines provide a method to incorporate agricultural considerations into local plans. The Guidelines outline ways to identify agricultural resource lands, locate lands of highest priority to agriculture, designate areas of agriculture, and implement these measures in municipal plans.

Inherent in the *Guidelines* is the assumption that if the planning process explicitly recognizes agricultural land as a valuable resource, farmland will only be taken out of production where the benefits of competing uses clearly outweigh the benefits of preserving the land for agricultural uses. Unfortunately, on "a clear day, an astounding 37 percent of the entire stock of [Canada's] Class 1 soil can be seen from the top of Toronto's CN Tower" (P. Sullivan, "The Rape of a Rare Resource", Legion, November 1981 at 22). It is this Class 1 prime agricultural land which is under the greatest pressure from urban expansion, power corridors, highways, and other land uses which take farmlands out of production. Whether policy guidelines, as opposed to legislation along the British Columbia model, will be sufficient to resist these pressures is doubtful.

Alberta has placed the primary responsibility for conserving agricultural land in the hands of the Alberta Planning Board constituted under the recently enacted *Planning Act* (R.S.A. 1980, c.P-9). Guideline documents have been issued specifying the Board's policies in several major areas. These policy areas include protection of the better agricultural land through local zoning, controlling residential development in agricultural areas by requiring minimum lot sizes, regulating rural industrial land uses at the municipal level, and by requiring that urban expansion be directed toward poorer agricultural land. In addition, the Environment Council of Alberta is currently conducting public hearings throughout the province for the purpose of making recommendations to the government which will ensure the maintenance and enhancement of the province's farmlands.

The foregoing discussion of the programmes and policies designed to enhance the agricultural land resources of Canada is necessarily cursory. However, should it give the impression that governments are responding to the issue in a way that will ensure the long term security of the country's agricultural land base, it should be noted that between 1961 and 1976, eastern Canada suffered a loss of 4 million hectares of productive agricultural land while 2.7 million hectares were added in western Canada for a net loss of 1.3 million hectares. Unfortunately, the land lost in eastern Canada is far more productive than the land put into production in western Canada.

Activity to preserve agricultural land is also taking place through the efforts of farm organizations and individual farmers. Legal techniques developed by common law and equity to control and regulate development of private property are being explored to determine their suitability for preserving agricultural lands. Farmers are considering placing easements or caveats on their lands which would bind future purchasers when the land is sold. Likewise, restrictive covenants which run with the land may prove to be a useful legal technique for controlling development which is incompatible with agricultural use. Finally, the acquisition of development rights by government or through a free market system has proved successful in certain parts of the United States and may be appropriate in some areas of Canada. The purchase and transfer of development rights may appear more attractive to government than land use zoning should a "property" amendment be added to the Canadian Charter of Rights and Freedoms.

In conclusion, the need to preserve the best agricultural land is becoming an issue of national importance. If the current rate of removal of farmland from production is to be reversed, all levels of government must work with the public to ensure a balanced approach to the competing demands upon our agricultural land resources. Productive agricultural land, like most other natural resources, is finite. The myth that land in Canada is inexhaustible should be put to rest. In any event, the need for further research into the methods of preserving agricultural lands is required.

The Alberta *Surface Rights Act,* 1983

In 1980, the Alberta Legislature appointed a Select Committee to review provincial policies and legislation relating to surface rights. The *Surface Rights Act,* S.A. 1983, c.S-27.1, was proclaimed on July 4, 1983, incorporating

many of the Committee's recommendations.

The common law right of a mineral owner in Alberta to use the surface to develop his minerals has been constrained for a number of years by surface rights legislation. The 1983 Act repealed the 1972 *Surface Rights Act,* although the basic structure of the earlier Act remains. Hence, the Surface Rights Board (SRB) is continued, with its authority to grant right of entry orders and compensation awards in the event that the parties are unable to negotiate a surface lease. Similarly, the Board continues to have jurisdiction over surface rights acquisition by operators for drilling sites and other mineral uses, pipelines, electric transmission lines, and telephone lines.

The key changes made by the new legislation are: the institution of a forced-take payment, a requirement of pre -payment of compensation, a more specific enumeration of certain heads of compensation, a provision dealing with the concept of residual value, the extension of the 5 year review provisions to pre-1972 orders and leases, and the expansion of the SRB's "off-lease" jurisdiction over damage to property and livestock.

The Select Committee closely examined the adequacy of compensation provided under the old Act. It recommended that a "force-take" payment be made to the surface owner to compensate for the lost right to exclude others from his or her land. The new Act requires that a one-time entry fee be paid to the surface owner or occupant prior to entry, *in addition* to any other compensation. The fee is to be the lesser of $5,000 or $500 per acre of the land granted to the operator. As well as the entry fee, the operator is obliged to make a pre-payment of compensation to the surface owner or occupant in the amount of 80% of the last written offer made by the operator, prior to the matter being brought before the SRB.

The Select Committee recommended that the list of factors to be considered by the SRB in determining compensation (which now appears in s.25) be made compulsory. However, the categories of compensation remain discretionary. Included in this list is "the market value of land ... sold by a willing seller to a willing buyer". This replaces the vague term "value of land" which appeared in the 1972 Act. The category of "per-acre value" was added to reflect a common SRB focus in awarding compensation for the taking of a fraction of a piece of property.

Prior to the new Act, some Board decisions were struck down by the courts on the ground that the Board failed to deduct the residual value from the compensation award (*e.g., Dome Petroleum* v. *Liivam Farms Ltd. and Farm Credit Corporation* (1982), 21 Alta. L.R. (2d) 323 (Q.B.), and *Gulf Canada Resources Inc.* v. *Moore and Farm Credit Corporation* (1982), 22 Alta. L.R. (2d) 328 (Q.B.)). Residual value takes into account factors such as the ability of a farmer to continue to use a field under which a pipeline is buried, as well as the ultimate reversion of the land to the surface owner and/ or occupant when the pipeline or wellsite is no longer used. In compensating the surface owner and/or occupant for the land taken, the courts considered that the value of this residual interest should be deducted from the value of the land, so that the surface owner or occupant is only compensated for rights lost. The *Surface Rights Act* now gives the SRB the discretion to ignore residual value.

In the old Act, sums awarded as annual compensation under either a lease or right of entry order granted after 1972 were reviewable every 5 years at the request of the surface owner. Responsibility for initiating review proceedings has now shifted to the operator.

In response to the Committee's recommendation, the review process has also been adopted for pre-1972 orders and leases. The relevant sections (28, 30) do not come into force until June 1st, 1985. Consequently, after this date, the SRB will be able to review the rate of compensation contained in these older orders and leases. This review applies even if the original lease or order does not contain a provision for annual or periodic compensation.

The SRB has a limited jurisdiction to settle disputes between operators and surface owners in relation to the surface owner's land which is *not* required by the operator, and for the loss of, or damage to, livestock or personal property. Under the new enactment, the monetary scope of this jurisdiction has been expanded to include disputes of up to $5,000 (rather than $2,000). As well, the Board may review disputes up to 2 years (rather than 6 months) after the damage was incurred.

Of the changes wrought by the 1983 legislation, the most far reaching is the "forced-take" payment. The provision concedes that a person whose land is expropriated should receive more than the fair market value of the land taken and loss incurred. There will be an additional payment to compensate for the forced aspect of the taking. It will be interesting to see what influence this development has on other expropriation legislation in Alberta and elsewhere.

Barbara Roulston
Second Year Law
The University of Calgary

Workshop on Offshore Installations and Canadian Law

The Institute is holding a one-day workshop on offshore petroleum installations and Canadian law on Wednesday, November 9, 1983 at The University of Calgary. Topics to be covered include a discussion of state of the art technology, the role of government and classification societies, the international legal background, the operators' perspective, and a number of substantive issues including labour, workers compensation, safety, liability for environmental damage, and a number of admiralty issues. Presentations will be made by speakers from industry, government, a classification society, a member of the Admiralty Bar in Nova Scotia, and the staff of the Institute. The workshop fee is $120 ($100 for subsequent registrations from a company or department) including lunch. Further details and registration forms are available from Shirley Babcock at 282-9197.

Digby Seminar

In mid-September, the Institute, together with the Nova Scotia Continuing Legal Education Society, sponsored a four day program in Digby, Nova Scotia entitled "The Atlantic Practitioner and the Offshore". Seminar leaders were Ian Townsend Gault of the Institute, and F. Van W. Penick of the Halifax firm McInnes, Cooper and Robertson. Other

faculty members included Donald C. Bews of Mobil Oil Canada, Ltd., Halifax; Phillip Bretzloff of Petro-Canada, Calgary; Rowland J. Harrison of the Canada Oil and Gas Lands Administration, Ottawa; Constance Hunt, Executive Director of the Institute; Evelyne Meltzer of Petro-Canada, Halifax; Eugene Silva of Vinson and Elkins, Houston, Texas; and W. Wylie Spicer, also of McInnes, Cooper and Robertson. Seminar participants numbered in excess of 70, and all sessions were extremely well-received.

A limited number of copies of the seminar materials are still available from the Institute for $50.

C.I.R.L. Essay Prize

The first C.I.R.L. Essay Prize, valued at $1,000, has recently been awarded. The prize is offered annually to the best law student paper submitted on any aspect of natural resources law. The recipient of the 1983 award is A. Keith Tuomi who submitted a paper entitled "Sections 50 and 51 of the *Constitution Act, 1982*". Mr. Tuomi received his LL.B. from the University of Toronto in 1983, and also holds a B.Soc.Sc., Honours Economics, 1979, from the University of Ottawa, as well as a M.Sc. Economics, 1980 from the University of London (London School of Economics). He is currently articling with the Toronto firm Stapells and Sewell.

A total of 16 papers were submitted by 16 contestants. All papers were reviewed by a selection committee consisting of P. Donald Kennedy, Q.C., Suncor Inc., Calgary (chairman); Edward J. Brown, Macleod Dixon, Calgary; and Errol P. Mendes, Assistant Professor, Faculty of Law, The University of Alberta, Edmonton.

Sincere thanks are extended to all students who submitted papers and to the members of the selection committee, with special congratulations to Mr. Tuomi. The deadline for submission of papers for 1984 is June 30.

Publications

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 pp. $7.50

This paper addresses the major legal constraints that would confront Canada in any attempt to cut off export commitments of electricity to the United States. The implications of such an action under both constitutional law and international law are discussed.

Given the nature of the Canadian federal system, either the Dominion government or a provincial government could conceivably take such an initiative. However, on balance, it is the former that must be considered as having the greater power to act in this respect. Provinces are largely limited to restricting the development of resources to be used in the generation of electricity for export.

Similarly, under the present constitutional framework, such curtailment carries with it no requirement for compensation by government. Nor would there seem to be a strong case for implied rights to compensation.

Under international law, while Canada maintains some general commitments to principles of trade liberalization, it has concluded no specific treaties guaranteeing exports of electricity to the United States. In the absence of such arrangements, it would be difficult to characterize curtailment of such exports by Canada as a breach of international obligations. It is questionable whether such curtailment would even be considered an expropriation, let alone an expropriation of foreign property. It is much more likely, especially looking at past practice, that the parties affected would treat the problem as one involving private contractual remedies, rather than searching for public law solutions.

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. $5.00

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

Resources: The Newsletter of the Canadian Institute of Resources Law. ISSN 0714-5918. Occasional free

Publications available from:
Canadian Institute of Resources Law
Rm. 430, Bio-Sciences Bldg.
Faculty of Law
The University of Calgary
Calgary, Alberta, Canada T2N 1N4
Telephone (403) 282-9197

Please add 10% for Postage and Handling (50% outside North America).

Canada Energy Law Service.
ISBN 0-88820-108-7. 3v.
available from Richard De Boo Limited
81 Curlew Drive
Don Mills, Ontario M3A 2R1