Resources
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Contractual v. Regulatory Models for Major Resource Development Projects

by Andrew R. Thompson
Westwater Research Centre
The University of British Columbia

A number of trends are encouraging government and industry today to consider contractual arrangements as a substitute for government regulation of resource development projects. Many aspects of a project can be handled in this way, particularly in the fields of managing social and environmental impacts and providing for the infrastructure requirements that the project imposes at the regional or local level.

A recent example is the agreement negotiated between Dome Petroleum Limited and the Lax KW'ALAAMS Band Council of Port Simpson on the west coast of mainland British Columbia. This agreement was filed with the National Energy Board and is to be made a condition of the Certificate of Public Convenience and Necessity to be issued by the Board for Dome's proposed liquid natural gas facility. It deals with all aspects of the project that must be regulated in order to meet the Band Council's concerns about safety, social welfare, and environmental impacts. Dome undertakes to establish an ongoing Liaison/Monitoring Committee to supervise compliance with the terms of the agreement and to submit disputes about future mitigation and compensation measures to this Committee for final resolution.

Other examples of the agreement approach are "Canada Benefits" packages which petroleum exploration companies are required to negotiate with the federal government as part of the exploration agreements covering offshore and northern petroleum lands under the *Canada Oil and Gas Act.*

In the May 1983 report of the Utilities Commission in British Columbia concerning B.C. Hydro's proposed Site "C" hydroelectric dam and generating station, the Commission recommended that B.C. Hydro should negotiate with local governments to provide compensation for specific losses such as administrative costs, lost tax revenues, and lost municipal properties and facilities due to flooding. As to future-identified impacts, the Commission recommended the establishment of a Monitoring Program to oversee the negotiation of mitigation and compensation agreements between B.C. Hydro and the municipalities.

The rationale for the negotiation of agreements in these cases is that the project proponent should pay the costs of mitigation and compensation necessary to offset environmental, social, and economic losses to a local region or community. These costs and the measures for dealing with them can best be determined by direct negotiations between the parties. This rationale is now widely accepted and underlies legislation in both Australia and the United States whereby project impacts are to be managed by the making of agreements. For example, in Queensland, Australia, the *State Development and Public Works Organization Act 1971-79* calls for "infrastructure agreements" at the regional and local levels of government; in Massachusetts, the *Hazardous Waste Facility Siting Act of 1980* requires that the project proponent bargain with a local negotiating team as to mitigation and compensation measures.

There is another rationale for such agreements that is gaining support. It justifies them on the ground that they provide the opportunity for greatly increased efficiency and effectiveness in gaining compliance with society's goals for resource development projects. In this formulation the agreements are seen as a form of deregulation. Negotiated compliance is substituted for enforcement by prosecution and penalties. The agreements offer increased efficiency and effectiveness by enabling regulatory activities to be coordinated through a "single-window" agency and "red tape" to be cut by substituting an overall management plan and approval process for the myriad of individual licences and permits that must now be obtained under a profusion of statutory requirements.

This deregulation approach is advocated in a paper presented by Professor Robert Franson of The University of British Columbia (UBC) law school to the National Conference on the Enforcement of Environmental Laws held in Edmonton in May. Professor Franson's paper was based on a research project carried out by UBC's Westwater Research Centre to investigate the possibility of using contracts as a means of regulating waste discharges by industry instead of pollution permits and penalties. The chief advantage of the contract model for pollution control is increased flexibility in response to the many unexpected events that occur in attempting to manage a complex industrial process in a particular air or water environment.

Westwater has also advocated the use of agreements in a presentation to the Northern Conservation Task Force

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

which is advising the federal government on the ingredients of a federal conservation program for northern Canada. In this case the recommendation is that the Territorial Land Use Regulations be amended so as to provide an exemption from the requirement of obtaining individual land-use permits in cases where the operator has negotiated and signed a comprehensive conservation agreement. Such an agreement would be particularly appropriate in the case of major petroleum or mining operations. The comprehensive agreement could provide a more effective method of ensuring proper conservation practices for the entire operation than the current requirement of a separate land-use permit for each individual land-use operation. Also, there would be a broader base for making trade-offs by acknowledging that some conservation losses should be endured because they are outweighed by offsetting gains in other conservation respects.

In northern Canada, if settlements of aboriginal land claims proceed on the model of the COPE (Committee for Original Peoples' Entitlement) Final Agreement, they will provide a "push" toward the negotiation of comprehensive land-use agreements involving native peoples, the federal and territorial governments, and industry. Only through such agreements will it be possible to knit together the various requirements of native land surface rights, renewable resource management agreements, government regulations, and industry concerns to produce a workable operating regime for development projects.

Negotiating such agreements will place new demands on those representing native people, government, and industry to be imaginative and flexible. For natural resource lawyers, the challenge is clear.

Recent Developments in Offshore Jurisdiction

Jurisdiction over offshore resources has long been a puzzle in Canadian law. The Supreme Court of Canada, through two recent decisions, has inserted key pieces into that puzzle, and given us a glimpse of how the final picture might look. However, a number of critical pieces are still missing, and we will have to await other developments before the puzzle is completely solved.

Reference Re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland (1984), 5 D.L.R. (4th) 385 [hereinafter the *Hibernia Reference*], was initiated by the federal government after the most recent breakdown in negotiations between Canada and Newfoundland over offshore jurisdiction. This *Reference* focused only upon the Hibernia oilfield, which is clearly beyond Canada's territorial sea. The federal government asked the court whether Canada or Newfoundland had "the right to explore and exploit the ... natural resources", and "legislative jurisdiction to make laws" to that end. Over a year earlier, the Newfoundland Court of Appeal had handed down its decision on a reference launched by the Government of Newfoundland, *Reference Re Mineral and Other Natural Resources of the Continental Shelf* (1983), 145 D.L.R. (3d) 9 [hereinafter the *Newfoundland Reference*]. Geographically, the provincial reference was cast more broadly, and asked "Do the lands, mines, minerals, royalties, or other rights, including the right to explore and exploit and the right to legislate, with respect to the mineral and other natural resources of the seabed and subsoil *from the ordinary low-water mark of the Province of Newfoundland to the seaward limit of the continental shelf* or any part thereof belong or otherwise appertain to the Province of Newfoundland?" (emphasis added).

In responding to the provincial reference, the Newfoundland Court of Appeal had, of necessity, considered the question that later was before the Supreme Court in the *Hibernia Reference,* namely, jurisdiction over the continental shelf. The Court of Appeal held against the province in relation to this area, because the historical record of Newfoundland, prior to its entering Confederation in 1949, revealed no act by which rights to the continental shelf had been acquired.

The Supreme Court came to the same conclusion in the *Hibernia Reference,* albeit by different reasoning. Clearly, for Newfoundland to succeed, the province needed to distinguish its position from that of British Columbia in *Reference Re Ownership of Offshore Mineral Rights,* [1967] S.C.R. 792 [hereinafter *1967 Offshore Reference*]. The Court concluded that although Newfoundland may have acquired external sovereignty prior to 1934, this right was lost in the period 1934-1949, when Newfoundland voluntarily submitted to a Commission of Government. Furthermore, nothing in the Terms of Union under which Newfoundland entered Confederation in 1949 could be construed to grant it continental shelf rights. In any event, the Court was unable to find that in 1949 international law permitted continental shelf rights to arise by operation of law in the absence of an express assertion of those rights. In the result, the continental shelf was not within the province's territory, and thus Newfoundland could have no legislative jurisdiction over it. Rather, Canada has the right to explore and exploit the continental shelf, as well as legislative jurisdiction over it pursuant to the "peace, order, and good government" authority.

Unlike the Supreme Court, the Newfoundland Court of Appeal in the *Newfoundland Reference* also considered the territorial sea. It concluded that prior to joining Confederation, Newfoundland possessed the constitutional status to acquire rights in the territorial sea. Several statutes revealed that it had exercised such rights. Neither the establishment of the Commission government in 1934 nor the 1949 Terms of Union altered this situation. Thus, the Court answered the province's reference positively in relation to a three-mile territorial sea, the distance claimed by Newfoundland prior to 1949. The Court pointed out that these provincial rights are subject to interference that may arise from any valid legislation of the Parliament of Canada pertaining to the inland waters and the territorial sea.

The Newfoundland Court of Appeal decision is on appeal to the Supreme Court of Canada. If the Court's finding with respect to the territorial sea is upheld, there is the possibility of further disagreement between Ottawa and St. John's over the scope of each government's legislative jurisdiction in that area. It may also prove necessary to draw boundaries delimiting Newfoundland's territorial sea from that of other provinces, notably Quebec.

The second decision of the Supreme Court of Canada concerning the offshore was handed down in May 1984 and relates to straits lying roughly between Vancouver Island and the mainland, *A.-G. Canada* v. *A.-G. British Columbia,* [1984] 4 W.W.R. 289 [hereinafter the *Georgia Straits Reference*]. By a four to two decision, the Court

affirmed the British Columbia Court of Appeal's earlier decision in this case, which held the straits to be the property of the province: (1976), 1 B.C.L.R. 97. Dickson, J. (as he then was), delivered the majority opinion, and pointed out that the case concerned proprietorship and not legislative jurisdiction. The less significant part of the decision involved the construction of historical documents pertaining to Vancouver Island and British Columbia, the analysis of which led the majority to conclude that the straits had been part of British Columbia at the time it entered Confederation in 1871.

The more interesting legal issue arose from the question of whether these straits had been included in the *1967 Offshore Reference,* pursuant to which Canada had been awarded property, the right to explore and exploit, and legislative jurisdiction in relation to the lands "of the seabed and subsoil seaward from the ordinary low-water mark on the coast of the mainland and the several islands of British Columbia, *outside the harbours, bays, estuaries and other similar inland waters,* to the outer limits of the territorial sea of Canada" (emphasis added). Canada asserted that the straits had been so included, because they were not "inland waters" under the common law, namely waters *inter fauces terrae* (within the jaws of the land). The Attorney General of Canada argued that the contrasting term, "internal waters", is drawn from international law, and denotes waters on the landward side of the baselines delimiting the territorial sea. On this theory, the explicit use of the term "inland" as opposed to "internal" waters in the area excluded from the *1967 Offshore Reference* would suggest that the straits were part of the exclusion only if they could be categorized as waters *inter fauces terrae.* However, the argument was rejected by Dickson, J., who, without citing authority, held that the term "inland waters" could be applied to either the common law or international law concept. Thus, in the majority view, a determination that the waters were not *inter fauces terrae* would not necessarily be dispositive of whether they were "inland" waters excluded from the *1967 Offshore Reference.* Instead, an analysis of the Court's reasoning in the *1967 Offshore Reference* convinced the majority that the earlier judgment dealt only with the territorial sea as defined by international law, and not with these straits.

The dissenting opinion, written by Madam Justice Wilson, reviewed in some detail the confusing common law concept of waters *inter fauces terrae.* In the result, she concluded that these straits did not fall under the common law definition because they are bounded by "jaws" or headlands belonging to two different nations, Canada and the United States. Furthermore, she was unable to find anything in British Columbia's history to show that its colonial boundaries encompassed the waters at issue.

The offshore puzzle now looks like this. Canada's rights to the continental shelf (the precise nature of which are dictated by international law) are free from claims by Newfoundland and British Columbia, and, by implication, by other provinces as well. Newfoundland has rights in relation to a three-mile territorial sea (pending the Supreme Court's review of the *Newfoundland Reference*), while British Columbia owns the straits to the east of Vancouver Island. Offshore issues have been put aside in relation to Nova Scotia, at least temporarily, through the 1982 federal-provincial agreement. Certain international offshore boundaries are still unsettled – for example, between Canada and the United States in relation to the Gulf of Maine, and between Canada and France in relation to St. Pierre and Miquelon. Boundaries may yet have to be drawn offshore between neighbouring provinces, and, where provinces have proprietary rights and/or legislative jurisdiction in parts of the offshore, disputes as to the scope of provincial authority (*vis-à-vis* that of Canada under s.91 of the *Constitution Act*) may still arise. Finally, the *Georgia Straits Reference* and the resulting confusion over the legal definition of waters *inter fauces terrae,* and the distinction between inland and internal waters, may lead to assertions of provincial offshore rights in other areas of Canada.

Constance D. Hunt

Second Banff Conference on Natural Resources Law: "Natural Resources Management in a Federal State"

The past decade has been an eventful one for Canada's evolution as a federal state. The patriation of the Constitution, the entrenchment of the *Canadian Charter of Rights and Freedoms,* and a series of federal-provincial disputes have made the period an exciting one for writers on federalism generally. This is especially true for those professionals concerned with the management of natural resources. Indeed the ability of the federal system to accommodate both national and regional aspirations has been tested no more severely than in this area.

Management of the offshore, sharing of natural resource revenues, aboriginal claims, energy pricing: all have achieved high profiles as issues of national concern. Additionally the ability of a federal system to resolve interprovincial conflicts, while a less-discussed issue, has been tested on a number of occasions, most recently in the Churchill Falls dispute between Quebec and Newfoundland.

The Second Banff Conference on Natural Resources Law will provide for the first time a national forum to deal comprehensively with the special problems of natural resources management in a federal state. The programme will include sessions on:

- Environmental Management
- Revenue Sharing
- Northern and Offshore Resource Management
- Federal Conservation Areas and Reserved Lands
- Interprovincial Cooperation on Resource Management
- The Federal State in an International Community

While dealing with a range of legal issues, the Conference will be of interest to a wider audience than natural resource lawyers. Industry and government personnel, public interest advocates, and academics with an interest in natural resources policy or federalism generally will also find the Conference of interest. Simultaneous sessions in selected areas will allow participants to focus on subjects of special interest. Finally, while emphasizing the Canadian experience with federalism, comparative studies drawing on lessons from other federal states will also be presented by speakers from the United States and Australia.

The Conference will be held April 17 to 20 at the Banff Centre. More detailed information on the programme will be available in the fall of 1984.

Regulatory Boards and the Oil and Gas Industry in Alberta

The Institute sponsored two seminars in March and May, 1984, on "Regulatory Boards and the Oil and Gas Industry in Alberta". They were attended by over 100 participants from the legal profession and industry.

Every phase of the oil and gas industry in Alberta is regulated by tribunals such as 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 was an intensive one-day teaching session designed to provide a working guide to the complexities of this regulatory scheme.

A comprehensive set of materials (including relevant statutory provisions, judicial cases, board decisions, and information letters) were prepared and are available from the Institute ($50.00).

CIRL Staff Changes

Nigel Bankes left the Institute staff as of July 1, 1984, to take up a full-time teaching position with the Faculty of Law at The University of Calgary. Our new Research Associate, Barry Barton, holds a B.A. and LL.B. (Hons.) from the University of Auckland, and pursued an LL.M. program at The University of British Columbia (UBC) in resources law. He has been a tutor in Land Law at the University of Auckland, and practised as a solicitor in New Zealand before coming to Canada in 1980. He spent two years as a Research Assistant at UBC's Westwater Research Centre, and has completed projects relating to mining law, surface rights, environmental law, energy project reviews, and water law.

Janet Keeping has served on the Institute's staff part-time since January 1984, and has recently been appointed Service Editor for the *Canada Energy Law Service.* A graduate of The University of Calgary's Law Faculty, she also holds a B.Sc. from the Massachusetts Institute of Technology and an M.A. (Philosophy) from The University of Calgary. She was called to the Alberta bar in 1982, and has taught as a sessional lecturer in the Faculties of Law and General Studies.

Publications

Canadian Maritime Law and the Offshore: A Primer, by W. Wylie Spicer. Canadian Continental Shelf Law 3; Working Paper 6. 1984. ISBN 0-919269-12-5. 65 p. $11.00

This paper reviews those principles of admiralty law that pertain particularly to oil and gas activities offshore Canada. Because Canada's entry into this sphere of endeavor is relatively recent, uncertainties and ambiguities in the law persist.

The basic nature of Canadian maritime law is examined, with an explanation of the role and jurisdiction of the Federal Court of Canada. The fundamental issue of whether, and for what purposes, an oil rig is a ship, is discussed, with a comprehensive review of both Canadian and English cases relevant to the issue. The difference between maritime liens and rights *in rem* is explained, along with the rules for enforcing the latter in the Federal Court.

The paper then turns to a contract used widely in the offshore, the drilling contract, and focuses upon the question whether such a document is akin, in law, to a charterparty, and with what possible legal consequences. The rules applying to salvage and towage operations are scrutinized. Issues related to offshore safety are looked at from the point of view of the possible application of shipping and other regulations, and of liability for marine damage.

The paper concludes with a review of the choice of law and forum clauses typically found in offshore agreements, and their legal ramifications.

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

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

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