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WTO Jurisprudence on GATT Article XX Extends Scope for Environmental Regulations

*by Dr. Irene McConnell**

Introduction

Activists demonstrating in Seattle in late 1999 disrupted the Ministerial Conference of the World Trade Organization. The demonstrators were a visible and vocal manifestation of a larger constituency who fear that the WTO, which provides the legal and institutional framework for advancing free trade worldwide, constrains the latitude of governments to regulate to protect the environment and maintain strict public health standards. Although GATT and WTO panel decisions have exhibited, in the past, a pro-trade bias, the WTO Appellate Body has introduced changes - as to procedure and substantive analysis of the GATT - that promise to offer governments more room to manoeuvre in regulating for the protection of the environment and public health. This article identifies the changes introduced by the Appellate Body and shows how they have influenced the WTO panel that recently upheld a French ban on the import of asbestos products (*Asbestos* case).[1]

GATT Rules for Trade and Environment

The GATT does not prescribe environmental policies or standards. Rather it provides a system of rules under which environmental measures are scrutinized. Thus, environmental measures must apply in a non-discriminatory manner, both as to the most-favoured nation rule of Article I (which requires non-discriminatory treatment of imports regardless of country of origin) and the national treatment rule of Article III (which requires non-discriminatory treatment between home-produced goods and imports). Environmental measures are also subject to the prohibition against quantitative restrictions on imports and exports in Article XI. Environmental measures, however, may be exempted from these rules through the exceptions provided by Article XX, two of which make room for public health and environmental concerns: Article XX(b) exempts measures necessary to protect human life or health, while Article XX(g) exempts measures relating to the conservation of exhaustible natural resources. Such measures are exempt provided that they do not constitute unjustifiable or arbitrary discrimination or a disguised restriction on trade.[2]

Résumé

La jurisprudence de l'organe d'appel de l'OMC sur l'article XX du GATT devrait apaiser les craintes de ceux qui redoutent que l'OMC ne restreigne la liberté des gouvernements de protéger l'environnement et de maintenir des normes strictes afférentes à la santé publique. L'organe d'appel de l'OMC a introduit des changements - relatifs aux régles de procédure et à l'analyse du fond du GATT - qui devraient offrir aux gouvernements une plus grande marge de manoeuvre eu égard à la réglementation de l'environnement et de la santé publique. Cet article identifie les changements apportés par l'organe d'appel et démontre comment ces changements ont influencé la commission de l'OMC qui a récemment confirmé l'interdiction par la France de l'importation de l'amiante et des produits en contenant.

Appellate Body Jurisprudence on Article XX

Appellate Body jurisprudence has introduced changes in matters of procedure and substantive analysis of Article XX that should make it easier for an envi-

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ronmental or public health measure to qualify for an exemption. As to procedure, the Appellate Body has ruled that panels have the discretion to accept and consider *amicus curiae* briefs offered by interested non-governmental organizations. *Amicus* briefs will be accepted when they are helpful in informing the panel of relevant facts as well as legal norms and principles applicable to the facts.[3]

The Appellate Body has introduced a contextual approach for interpreting Article XX exceptions. The context includes developments in scientific knowledge and the contemporary concerns of the international community for environmental protection.[4] In addition, WTO agreements provide a context for interpreting the GATT.[5] For example, the preamble to the Agreement Establishing the WTO recognizes that the WTO goal to improve economic welfare through increased trade must accommodate the objective of sustainable development with its emphasis on protecting and preserving the environment. Context is also provided by the numerous modern international conventions and documents which address matters of environmental protection and preservation.[6] This contextual approach to interpretation signifies that the GATT should no longer be interpreted in isolation from contemporary national and international concerns for environmental protection.

The Appellate Body has prescribed a methodology for panels to use in determining whether an environmental measure qualifies for an Article XX exemption. Central to the methodology is careful adherence to the language of Article XX, so as to give full effect to the exceptions the text provides for.[7] The methodology consists of two steps, which reflect the two-tiered structure of Article XX. The first step, to determine whether the measure legitimately falls within the scope of the policy objective identified in paragraphs (b) or (g), provides provisional justification of the measure.[8] The second step, which focuses on the conditions expressed in the chapeau of Article XX, questions whether the measure, either on its face or in its application, constitutes unjustifiable or arbitrary discrimination or a disguised restriction on trade.[9] This step is aimed at ensuring that the right to use the exceptions is exercised reasonably so that a member's right to pursue a legitimate policy is balanced with its obligation to provide market access to the goods of other members.[10] Strict adherence to this methodology is designed to prevent *a priori* condemnation of measures that, in the past, have been viewed as a threat to the multilateral trading system, such as unilateral measures that condition market access on a change in the environmental policies of exporting countries.[11] The Appellate Body has stated that categorically condemning such measures would render Article XX exceptions ineffective: conditioning market access on the adoption of the policy of the importing country is a common aspect of measures designed to achieve Article XX policy objectives.[12] That being stated, the Appellate Body has made it clear that unilateral measures which impose rigid, inflexible standards without regard to the conditions which prevail in exporting countries will not receive an Article XX exemption.[13]

The Appellate Body has provided specific guidance on the interpretation of the language of paragraph (g). (It has yet to make a ruling on the interpretation of paragraph (b), although it appears likely to do so when Canada appeals the *Asbestos* case.) First, exhaustible natural resources include not only mineral or non-living resources but also living or renewable resources. The Appellate Body has avoided deciding whether paragraph (g) implies a jurisdictional limit on the location of the resources that a conservation measure can legitimately encompass. It has noted, however, that a sufficient connection exists, for example, between a regulating country and the endangered species it aims to protect when those species migrate through waters over which the regulating country exercises jurisdiction.[14] Secondly, the words "relating to" in the text of paragraph (g), require that the relationship between means (the challenged measure) and end (the goal of conservation) be close and genuine, not merely incidental or inadvertent.[15] The nature of this relationship is to be determined by examining the general structure and design of a measure and its purported conservation goal; for example, a measure that is disproportionately wide in its scope and reach will not show the close and genuine relationship of means and end required by paragraph (g).[16] Finally, paragraph (g) requires that restrictions on imports and on domestic production be imposed in an even-handed, although not necessarily identical, manner.

The Appellate Body's interpretation of paragraph (g), based on careful attention to the text and its ordinary meaning, will provide governments with more room to manoeuvre in regulating for conservation purposes than did earlier interpretations of paragraph (g) which often bore little relation to the actual language of the text. Some of these required that a measure be primarily aimed at conservation, indeed, that it be effective in achieving the conservation objective.[17] Another interpretation required that conservation measures aimed at imports serve essentially to ensure that restrictions on domestic production are not undermined.[18] Another required a form of cost-benefit analysis to justify a conservation measure under paragraph (g).[19] Appellate Body jurisprudence requires only that the regulating country establish a close and genuine connection between the measure and the conservation goal and that it apply restrictions on imports and domestic production with an even hand.

The Asbestos Case

The analysis and reasoning of the WTO panel in the *Asbestos* case reflects the Appellate Body jurisprudence on Article XX. In this case the panel ruled that an

import ban on products containing asbestos was justified under Article XX(b) as a measure necessary to protect human health from the carcinogenic risks posed by asbestos. The ban - which was imposed by France in January 1997 and includes the manufacturing, processing and sale of asbestos - was designed to protect a broad section of the French population. This included workers in the mining and processing sectors and also the large numbers of workers in the textile, building and automobile industries as well as do-it-yourselfers and the general public who are exposed to the numerous products containing asbestos fibres.[20] Canada challenged the import ban as discriminatory contrary to the national treatment rule in GATT Article III.4 and to the Article XI prohibition against quantitative restrictions. Canada argued further that the import ban could not be justified under Article XX(b) on two grounds: first, asbestos, in the form of the high-density chrysotile products that Canada exports, does not pose any detectable risk to health; and, secondly, regulating the safe or controlled use of chrysotile products provides a less trade-restricting alternative to an import ban. The European Communities (EC), representing France at the WTO, defended the import ban on the basis that it is the only measure capable of preventing the risks of cancer associated with the use of chrysotile products.

The panel found that the import ban was discriminatory contrary to the national treatment rule of Article III.4. France had banned imported chrysotile products while domestically-made substitute products (those made of polyvinyl alcohol, cellulose and glass fibers) were not banned. The result was less favourable treatment of chrysotile imports. Having found a violation of Article III.4, the panel found it unnecessary to rule on the violation of Article XI.

In concluding that the import ban violated Article III.4, the panel was required to find that the imported chrysotile product was "like" the domestic substitute products and, consequently, must be accorded national treatment. In determining likeness, the panel applied four criteria that the Appellate Body has identified as being helpful: the properties, nature and quality of the products; the products' end-uses in a given market; consumers' tastes and habits; and tariff classification.[21] The panel noted that, in purely physical terms, the products were not alike - none of them had the same physical structure or chemical composition. However, the panel decided that likeness is to be determined not in the context of classifying products on a scientific basis but rather in the commercial context of Article III, that being to discourage protectionist measures that reduce market access for foreign products.

Within this commercial context, the panel examined the properties, nature and quality of the products concerned as well as their end uses, having concluded that consumers' tastes and habits and tariff classification were not helpful in this case. The panel ruled that, to the extent that one product can replace another in a given market when they both have certain (but not necessarily all) end-uses in common, the products are equivalent and therefore "like" for the purposes of the national treatment rule.

In its analysis of likeness, the panel rejected the relevance of risk to human health as a criterion for differentiating between chrysotile products and their substitutes. The panel reasoned that, in those cases where risk is invoked, allowing risk to determine likeness would virtually foreclose the application of other criteria for determining likeness. Furthermore, the Panel concluded that the GATT structure required considering risk under Article XX and not under Article III. Article III functions as a rule to discipline the trade effects of domestic regulation, while Article XX is included to allow certain non-trade values (such as protection of human health) to take precedence regardless of the trade rules. Thus, risk to human health should be considered not under Article III which serves to discipline health protection measures but under Article XX which provides an exemption for such measures.

The panel's rejection of risk as a criterion for determining likeness under Article III is problematic. The structure of the GATT should not dictate the interpretation of the text of Article III. If the health risk of a product arises from its properties, its very nature, then that health risk is surely relevant in determining whether another product, the properties and nature of which do not pose a health risk, is a like product. Furthermore, the commercial context for determining likeness under Article III.4 need not be narrowly focused on market access and the protection of the producer interest. A commercial context should also accommodate consumers in the market whose considerations of health risk may well determine the choices they make between products - particularly when the products have the same end-use. In rejecting the relevance of risk, the Panel failed to apply adequately all the criteria that the Appellate Body has identified as relevant in determining likeness for the purpose of Article III.4.

Having found a violation of Article III, the panel considered whether the import ban fell within the exemption provided by Article XX(b). The panel followed the two-step analysis of Article XX prescribed by the Appellate Body, examining France's import ban, first, for provisional justification under paragraph (b) as a measure necessary to protect human health and, secondly, for compliance with the prohibitions against unjustifiable or arbitrary discrimination and disguised restrictions on trade set out in the chapeau to Article XX.

The panel began its analysis of paragraph (b) by noting that the words "to protect human health" required the EC to establish a *prima face* case, on the balance of probabilities, that chrysotile

products pose a risk to human health. The EC did so by presenting evidence that international bodies have acknowledged, for some time, the carcinogenicity of chrysotile fibres when inhaled and that the types of cancers caused by chrysotile have a mortality rate of close to 100 percent. Furthermore, risks of cancer exist even with incidental exposure to chrysotile, and medical science has been unable to establish a safe threshold below which exposure to chrysotile poses no carcinogenic risk. The panel concluded that the evidence presented by the EC (which Canada failed to rebut) showed that chrysotile products pose a serious carcinogenic risk.

Four *amicus curiae* briefs on the health risks of asbestos were presented to the panel, two of which the EC decided to include in its submission. The panel exercised its discretion in rejecting the remaining two briefs and a fifth brief that was submitted too late in the proceedings to be taken into account. It is not clear to what extent the panel found the information in the two briefs that became part of the EC submission helpful. Much clearer is the panel's extensive reliance on the advice of four experts in asbestos-related diseases, one from the United States and three from Australia. The panel consulted the experts to help it understand and evaluate the evidence on risk submitted by the two parties and ultimately to confirm the EC evidence that chrysotile products pose a serious risk to human health.

To complete its examination of France's import ban under paragraph (b), the panel turned to the word "necessary" in the text and, on the basis of two previous panel reports,22 reasoned that the necessity of the import ban would be determined, first, by identifying the scope of the health policy objectives pursued by France and, secondly, by considering whether an alternative measure exists that is consistent or less inconsistent with the GATT. As to the scope of the health policy objectives, the panel noted that the numerous applications of chrysotile products expose a broad section of the French population to an undeniable health risk even at low or intermittent exposure levels. France had chosen to counter this serious risk with a serious measure – a production and import ban on asbestos products. Although the high level of protection chosen by France could not be challenged *per se*, France was required to justify the level of protection offered by the import ban by showing that no alternative measure existed that was reasonably available and would achieve the high level of protection it desired. Canada argued that an alternative did, indeed, exist in the form of regulating the safe or controlled use of chrysotile products based on international standards. Controlled use would require taking precautionary measures to restrict the release of fibres (through the use of special tools, high density products, and special methods for handling chrysotile products) and to decontaminate equipment and work clothing.

The panel concluded that controlled use was not an alternative to the import ban. First, controlled use would not allow France to achieve its public health objectives. Although controlled use might protect workers who mined, processed and removed chrysotile, it would not protect others who had been particularly targeted for protection by the ban. These include workers in the building sector, who are highly mobile, sometimes inadequately trained and dispersed over a large number of sites; do-it-yourselfers, who operate outside any proper system of controls; and others among the population, who are present at work sites and exposed to chrysotile fibres as a result of pure chance. Secondly, controlled use is not reasonably available as an alternative to the import ban. Although France could be expected to make the necessary expenditures to implement controlled use, given its advanced labour legislation and specialized administrative capacity, it would be unreasonable to expect France to do so when the circumstances of controlled use are, as in this case, not controllable.

Once provisional justification for import ban had been established under paragraph (b), the panel examined the import ban for conformity with the conditions set out in the chapeau of Article XX. The panel found that there was no evidence that discrimination of the sort prohibited by Article XX – unjustifiable or arbitrary discrimination between suppliers of chrysotile products – existed on the face of the import ban or in its application. There was also no evidence that France intended the import ban as a guise for concealing the pursuit of trade-restrictive objectives or that French authorities administered the ban with protectionist objectives.

In the result, the import ban violated the national treatment rule but was justified as a measure necessary to protect human health. This result was achieved through an interpretation of Article XX that gives effect to the exception for public health measures that paragraph (b) provides for. The requirement to establish a *prima facie* case for the existence of risk to human health was met when the EC evidence showed that exposure to chrysotile products poses a serious carcinogenic risk. This requirement should not prove problematic when paragraph (b) is invoked in the future as long as panels do not require proof that the health risk is *serious*. The text of paragraph (b) does not require such proof. It should be sufficient for a regulating country to establish only that the health measure falls within the scope or range of policies designed to protect human health.[23] The necessity test then provides adequate safeguards to discourage the gratuitous burdening of international trade. Under this test the regulating country must consider alternative measures but only to the extent that these would satisfy its health policy objectives and could be implemented given its legal and administrative capacity. This formulation of the necessity test ensures that health policy objectives are not trumped by trade policy concerns. At the same

time, a measure of discipline is imposed to encourage governments to choose regulatory instruments that impose a lesser rather than greater restriction on trade.

Conclusion

The development of WTO jurisprudence on Article XX extends considerably the room that governments have to manoeuvre in exercising their regulatory powers for environmental and health protection purposes. This jurisprudence rejects many of the constraints imposed by earlier jurisprudence that made it difficult to justify trade-restricting environmental and health regulation.

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Notes

1. *European Communities – Asbestos*, WTO Panel Report, September 18, 2000, WT/DS 135/R (*EC-Asbestos*).

2. Article XX(b) and (g) reads: Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
"...
(b) necessary to protect human, animal or plant life or health;
...
(g) relating to the conservation ofs exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

3. *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body Report, 12 October 1998, WT/DS58/AB/R at paras. 106, 108 (*Shrimp/Turtle (AB)*).

4. *Shrimp/Turtle (AB)* at paras. 128, 129.

5. *Shrimp/Turtle (AB)* at para. 129.

6. *Shrimp/Turtle (AB)* at para. 130.

7. This rule of interpretation is embodied in Article 31 of the Vienna Convention on the Law of Treaties, 23 May 1969, in force 1980, reprinted in (1969) 8 ILM 679.

8. *Shrimp/Turtle (AB)* at para. 149.

9. *Shrimp/Turtle (AB)* at para. 160.

10. *Shrimp/Turtle (AB)* at para. 156.

11. *Shrimp/Turtle (AB)* at para. 121.

12. *Shrimp/Turtle (AB)* at para. 121.

13. *Shrimp/Turtle (AB)* at paras. 164-165.

14. *Shrimp/Turtle (AB)* at para. 133.

15. *Shrimp/Turtle (AB)* at para. 141; *United States – Standards for Reformulated and Conventional Gasoline*, WTO Appellate Body Report, April 29, 1996, WT/DS2/AB/R, reprinted in (1996) 35 ILM 603 at 623.

16. *Shrimp/Turtle (AB)* at paras. 137-141.

17. *United States – Restrictions on Imports of Tuna*, June 1994, GATT Panel Report (unadopted) reprinted in (1994) 33 ILM 839 at para. 5.22; *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT Panel Report (1987-1988) BISD 35S/98 *(Unprocessed Herring and Salmon)* at para. 4.6.

18. *Unprocessed Herring and Salmon* at para. 4.6.

19. *Canada's Landing Requirement for Pacific Coast Salmon and Herring*, Canada-United States Free Trade Agreement Panel Report, October 16, 1989 at para. 7.08.

20.These products are identified in *EC-Asbestos* at para. 3.23.

21. *Japan – Taxes on Alcoholic Beverages*, Appellate Body Report, 4 October 1996, WT/DS8/AB/R.

22. *Thailand – Cigarettes*, GATT Panel Report (1990) BISD 37S/200; *United States – Section 337 of the Tariff Act of 1930*, GATT Panel Report (1988-1989) BISD 36S/345.

23. *EC-Asbestos* at paras. *8.167, 8.171.*

Correction to Resources #70 Spring 2000

The seventh paragraph on page one and two of the article entitled "The New Species at Risk Act and Resources Development" by John Donihee was incorrect. The following is the corrected version of the paragraph.

Canada was the first industrial nation to ratify the *Convention on Biological Diversity* which included a commitment to legislation for the protection of threatened or endangered species. The federal and provincial governments responded to the commitments made in the Convention by developing the *Canadian Biodiversity Strategy* which includes provisions addressing the restoration or rehabilitation of both species and ecosystems. In 1996 the federal, provincial and territorial governments negotiated a national Accord for the Protection of Species at Risk. Introduction for first reading of Bill C-64, in October 1996, followed closely on these events

Recent Developments in Canadian Oil and Gas

by Nigel Bankes

Drilling contract dispute and the duty to use "best efforts"

In order to finance the construction of a drilling rig, H & R entered into a standard daywork contract with three parties including Aquilo. Aquilo agreed to take the rig for a 125 days a year for 2 years. Under the contract A & R agreed to use "best efforts" to have the rig available by a specified date but a force majeure clause relieved the parties from liability when performance was hindered or prevented by, inter alia, fire. Performance of suspended obligations was to commence as soon as reasonably possible after the force majeure event ceased to exist. Construction was delayed by a fire and as a result Aquilo's expectations of being able to use the new rig to meet a commitment well were frustrated and it was forced to make alternative arrangements. Subsequently Aquilo used the rig for less than the contracted time, and refused to pay for the time it did not use. Upon being sued for monies owing Aquilo defended on the basis that H & R was in breach by not using "best efforts" to complete the rig and also seems to have sought set-off on the basis of the additional expenses incurred in making alternative arrangements to drill the commitment well. Justice Clackson of the Alberta Court of Queen's Bench rejected Aquilo's defences in *H & R Drilling Inc.* v. *Aquilo Energy Inc.*, [2000] AJ 718. The court ruled that "best efforts" "cannot mean as fast as possible but must mean as fast as reasonably and prudently possible." It was reasonable and prudent for H & R to delay re-commencing work on the rig until it had been inspected by H & R's insurers and major suppliers to confirm that their warranties would still be effective.

Some (obvious?) limits on the authority of the oil and gas conservation board

B drilled an off-target gas well in 1993. C, with production from the same pool as well as being the owner of the offsetting section on which there was no well, cried foul. The Energy and Utilities Board assessed an off-target penalty and a reduced allowable and required the parties to submit annual pressure data which B and C failed to do. B never exceeded the allowable but the actual pressure decline in the pool was faster than originally anticipated and C applied to the EUB to have the well, now owned by D, shut-in. The Board obviously agreed with the equity of the claim but its attempts to right past wrongs met with judicial censure.

The Board's mistake was to reason that it had set the original allowable too high and that it would have reduced the allowable had the required pressure data been submitted. It therefore reduced the allowable on a retroactive basis, found that B & D's actual production exceeded the allowable and promptly shut-in the well until the excess production and penalty had been worked off. It was now D's turn to cry foul and the Alberta Court of Appeal on a statutory review agreed: *Beau Canada Exploration Ltd.* v. *Alberta Energy and Utilities Board* [2000] ABCA 132. Justice Hunt for an unanimous Court recited the standard rule of statutory interpretation to the effect a power to make retroactive orders or orders with retrospective effect (to Justice Hunt this was a distinction without a difference) can only be granted through clear legislative language. Applying that rule here, Justice Hunt noted that there were examples of the legislature authorizing orders with retroactive effect in the *Oil and Gas Conservation Act* (e.g. the common orders) but that was not the case for the Board's authority to establish allowables. This was a jurisdictional error for which the standard of review was "correctness".

The Board also failed in its attempts to convince the Court that since it had authority to shut-in a well for breach of a regulation, and since there had been such a breach (namely the failure ti supply the required production data), it therefore had the authority to shut-in D's well. Neither C in its application nor the Board in its decision relied on this power and while that, in and of itself was not fatal, it would have been a procedural error to rely on that ground now since the result would be to deny D the opportunity to make submissions on the case that it had to meet. In the result the matter was referred back to the Board for its re-consideration. The Court's decision is surely correct for it is an elementary principle of justice that a regulator must not authorize B to behave in a certain manner and then turn around and penalize B for so acting because the rules of proper behaviour have been changed retroactively. There are clear parallels between this case and the *Sarg Oils* case discussed in # 64 of *Resources* in which the Court also reminded the Board of the danger of changing the rules of the game in mid-flow.

One other aspect of the Board's decision merits attention. The Board (in Decision 99-21, available at www.eub.gov.ab.ca) decided that, for the future (should the well ever work off its over-production), the off-target penalty should be rescinded. Why? Because in the absence of a well on the offsetting acreage the Board was not prepared to find that inequitable drainage was occurring. The Court found it unnecessary to comment on this finding.

When is a well an exploration well?

Resman Holdings claimed that any well was an exploration well (the costs of which merited full and immediate deduction under the *Income Tax Act* (ITA)) unless the well was surrounded on at least three sides by offsetting producing wells. The rationale for this

proposition was that except in such a case there was a serious risk of drilling a dry well. Somewhat surprisingly the Tax Court agreed with Resman and it was left to the Federal Court of Appeal in *Resman Holdings* v. *Canada* [2000] FCJ 755, rev'g (1998), 98 DTC (TCC) to point out that in this case the legislature had clearly indicated that the status of a well was not be made on the likelihood of encountering oil or gas, but, after the event, and based upon: (1) abandonment, or (2) if production was attained whether that production was from an existing known pool.

The Court also noted that the term "accumulation" as used in the ITA and in the context of hydrocarbons was to be defined as that term was understood in the oil and gas industry where it had the same meaning as the term "pool" conventionally used in provincial oil and gas conservation legislation. In the result therefore Resman's 28 step-out wells, all of which attained production within the prescribed time from a known pool, were deemed to be development expenses deductible on a declining balance basis at the rate of 30% per year. Two further wells one of which was used for saltwater disposal and a second of which had been taken-over a shallow rights owner were also deemed to be development wells.

Court confirms liability of current lessee for brine and hydrocarbon contamination caused by previous lessee

Using Alberta's still relatively new *Environmental Protection and Enhancement Act* (EPEA), the Minister adopted the recommendation of the Environmental Appeal Board ((EAB) that the Minister confirm an environmental protection order (EPO) issued against L Co and F its sole director and shareholder requiring that they clean-up brine and hydrocarbon contamination at a well site currently owned by L Co. L Co acquired the mineral and surface lease to the lands in 1961 but much of the contamination was thought to date back to the period from 1953-1961. On F and L Co's application for judicial review, Justice Clackson of the Alberta Court of Queen's Bench in *Legal Oil and Gas Ltd.* v. *Alberta* (Minister of the Environment) [2000] AJ 684 (QB) confirmed the EPO. The court held that the Minister and the Board should be accorded a high degree of deference and that the court should only intervene if their decisions (or recommendations in the case of the EAB) were patently unreasonable. The court noted that both the Minister and the Board were protected by a broad privative clause and that determinations under EPEA required both expertise and a balancing of various policy considerations. That said, there was a sufficient basis for the EAB and the Minister to have found that both F and L Co were "person(s) responsible" as that term is defined in EPEA, not only with respect to the actual well-site, but also with respect to the surrounding area on to which the contamination had migrated. The retrospective effect of the EPO (it related to both continuing contamination and contamination that pre-dated EPEA) was held to have been contemplated by s.102 of EPEA or failing that, to fall within a recognized exception to the injunction against retrospective legislation, namely, where the provision is designed to protect the public interest.

Saskatchewan Court of Appeal confirms important decision on the AFE

I discussed the trial decision in *Duce Oil Ltd.* v. *Coachlight Resources Ltd.* (1999), 181 Sask R. 125 in Resources # 66. The Saskatchewan Court of Appeal has now confirmed that judgement: [2000] SJ 352. Rightly or wrongly, the Court characterized the grounds of appeal as raising questions as to the findings of fact by the trial judge, and, as a result, the appellant joint operator (Duce) was faced with the uphill and unrewarding task of showing that the trial judge had made a "palpable or overriding error" in her appreciation of the evidence. More specifically, the Court found Duce, having authorized the various steps giving rise to additional expenses, was precluded from "taking issue" with those expenditures notwithstanding the absence of a supplementary AFE. The Court also confirmed Duce's liability to pay for its share of a pump installed by CR after Duce was in default and for which it received no AFE. I criticized this conclusion of the trial judge in my earlier note on the case and the legal point is not expressly addressed by the Court of Appeal which, consistent with its overall approach, characterized the issue as that of "reasonable and proper behaviour" on the part of the operator rather than that of the correct construction of the CAPL agreement.

Confidentiality of information under the *Canada Petroleum Resources Act* (CPRA)

With exploration activity heating up in the Northwest Territories, we shall likely see more interest in the CPRA and especially in the very formal procedure laid out in that Act for recognizing significant and commercial discoveries (DSD and DCD). While the current case law deals with the analogous (but not identical) offshore legislation, Canadian Forest Oil has commenced an application for judicial review in relation to a DCD issued in the NWT. To date the only decision that we have is Justice Sharlow's decision in *Canadian Forest Oil Ltd.* v. *Chevron Canada Resources and Ranger Oil*, [2000] FCJ 963 (FCA) dealing with disclosure of information. The NEB granted Chevron a DCD for its significant discovery licence (SDL). Forest, the licensee of a contiguous block, received no notice of the application for the DCD, sought review and also sought production of technical material filed by Chevron in support of its application. The NEB resisted production on the grounds that the information was privileged and that therefore the NEB was obliged not to disclose it under s.101 of the CPRA. Forest relied upon an exception in s.101 to the effect that disclosure is permitted "for the purposes of the administration or enforcement" of the CPRA, Part II.1 of the NEBA or the Canada Oil and Gas Operations Act. Justice Sharlow agreed

noting that the authority of the NEB to issue a DCD is an integral part of the CPRA regulatory scheme and an aspect of the administration of the Act. Equally at issue was the NEB's determination of who the "directly affected persons" were under Part II.1 of NEBA. This was a critical aspect of the statutory procedure and therefore also related to the administration of NEBA. Justice Sharlow concluded by according Chevron the opportunity to protect confidential information by bringing an appropriate application under Rule 151 of the Federal Court Rules.

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New Publications

***Resource Development and the Mackenzie Valley Resource Management Act: The New Regime**, by John Donihee (Contributing Editor), Jeff Gilmour and Doug Burch. 2000. 281 pp. ISBN 0-919269-49-4. $40.00*

The *Mackenzie Valley Resource Management Act* (MVRMA) was called into force in December 1998, thus satisfying one of the most important commitments made by Canada when the Gwich'in and Sahtu Dene and Metis land claim agreements were settled. This new legislation has reordered the regulation of resource development in the Mackenzie Valley which comprises all of the NWT except the Inuvialuit Settlement Area. The MVRMA establishes new institutions of public government, including regional Land Use Planning Boards, Land and Water Boards and an Environmental Impact Review Board with jurisdiction over the Mackenzie Valley.

This book provides a thorough and timely analysis of the new regulatory regime applicable in the Mackenzie Valley. It will be of assistance to managers of oil and gas, mining and other companies active in the Mackenzie Valley, government regulators, lawyers, consultants and members of First Nations. Based on a working paper prepared for a June 1999 conference and updated in July 2000, this text includes a comprehensive overview of the new statutory regime, case studies of the application of the MVRMA to hypothetical oil and gas and mining as projects and also includes conference key note addresses from leaders of First Nations, industry and government, as well as other resource materials.

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