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Is British Columbia Leading the Way in Natural Resources Management? Part II

Ethics and Resource Takings: The Schwindt Report[1]

*by Nigel Bankes**

Introduction

Several years ago, the Supreme Court of Canada decided the *Tener* case.[2] The Court ruled that the provincial government's refusal to allow the holder of a Crown granted mineral claim, the permits necessary to carry out further work on the claim constituted an expropriation for which the claim holder was entitled to compensation. The judgments in the case (by Estey and Wilson JJ.) did not turn on any rule of constitutional law, for the Canadian Constitution has little to say about the validity of such a taking or about the principles of compensation that might apply.[3] Neither were the judgments based upon any express articulation of an ethical basis of a claim to compensation. Instead, the judgments turn upon an old principle of statutory construction ("Unless the words of a statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation."[4]) and the complex interaction of several provincial statutes including the *Lands Clauses Act*, the *Ministry of Highways and Public Works Act* and the *Provincial Parks Act* (the claim was located in a provincial park).

Résumé

L'année dernière, le gouvernement provincial de Colombie-Britannique a invité le professeur Richard Schwindt à étudier la question de l'indemnisation pour la révocation des droits aux ressources naturelles. En commandant ce rapport, le gouvernment provincial indiquait son insatisfaction à l'égard des solutions jusque-là adaptées aux circonstances. Le rapport revient aux principes de base et replace la question de l'expropriation dans le contexte plus général de l'éthique et des droits de propriété. La commission analyse aussi bien le secteur forestier que le secteur minier et propose trois méthodes de calcul d'une indemnisation juste en cas de révocation de droits par le gouvernement. Dans le cas des droits forestiers, la commission propose d'octroyer une indemnisation sur la base des prévisions soutenues par des investissements du bénéficiaire. Pour ce qui est des droits d'exploration miniers, l'indemnisation serait payable sur la base des frais encourus, tandis que pour les mines en exploitation, l'indemnisation serait octroyée sur la base de la valeur marchande.

Inside

Tener was an *ad hoc* decision on a general problem. The Court did not engage in a detailed analysis of how compensation was to be calculated; this determination was to be left to the compensation assessment process.[5]

In appointing the Schwindt Commission, the provincial government was indicating its dissatisfaction with the *ad hoc* approach exemplified by *Tener*. The Schwindt Report is an attempt to articulate a more principled, normative response to this question: how ought we to treat the private owner of public resource rights when government reallocates those resource rights to a different use?

The Need for a Principled Response

If *Tener* were simply an isolated incident we might, from a public policy perspective, take the view that the executive and the courts should be let alone to muddle along from one problem to the next. But it is clear that the resource use conflicts that lay behind *Tener* are pervasive. They are also becoming more, rather than less, difficult to resolve as public resources become fully allocated. No longer does the Crown have a reserve supply of unallocated timber to grant to an operator when a portion of a tree farm licence (TFL) is withdrawn for a national park. This is a relatively new problem on Canada's west coast. When Pacific Rim National Park was created, the provincial government had sufficient flexibility to allocate alternative timber supply areas.[6] But by the time the Gwaii Haanas Archipelago [South Moresby] National Park[7] was created, alternative supplies had been exhausted, and federal and provincial governments were faced with calculating monetary compensation for the loss of cutting rights from both a TFL and several timber licences. Crown mineral interests were also affected by the creation of that Park. Similarly, wilderness protection for the Tatshenshini/Alsek region would raise the question of the entitlement to compensation of Geddes Resources for the proposed Windy Craggy Mine.[8]

Apart from the pervasive nature of the problem, there are at least two other reasons for wanting to venture beyond the *ad hoc* response — demoralization costs and settlement costs. The argument may be put this way. If our society does not clearly articulate both the circumstances under which compensation will be payable, and the method for calculating compensation, then we can expect the resulting uncertainties to **discourage** investment and **encourage** expensive and acrimonious litigation. No doubt both claims are difficult to document but we can, I think, justify the assertion that *Tener* seems to have raised more questions than it resolved, and to have encouraged litigation.[9] On the settlement costs issue, the Schwindt Report tartly observes (p. 46):[10] "After going to the Supreme Court of Canada, this case was finally settled recently for a sum that is less than the settlement costs borne by the government, the taxpayer and the company".

The Difficulty of the Issues

That the issues are difficult brooks no dissent, but why is this so? The Schwindt report gives us several reasons ranging from the philosophical, through public policy, to the purely technical. At a philosophical level, the report correctly recognizes that a principled response to expropriations must be set in the broader context of justifications for the concept of property. The commission itself draws particularly heavily on the utilitarian justifications for property (p. 18), but also upon desert theories, and arguments from justice.[11]

From a public policy perspective, a key difficulty lies in the relationship between a expropriations policy and the broader policies required to deal with such problems as land-use conflicts, and the negative effects of social and economic change for those communities affected by resource withdrawal decisions. Why, for example, should a compensation policy focus on the interests of the resource holder and all but ignore those whose employment or other contractual relationships will be affected by the loss of wood supply to a mill? These issues, while recognized to be important, were beyond the mandate of the Commission and it was able to do no more than highlight the concerns that had been drawn to its attention (p. 3). The Commission did, however, address itself to the question of **when** society should expropriate and reallocate resources. Its answer should not surprise: only when the result would be to increase social welfare (p. 30), a welfare calculation that, the commission observed, government must "get right" (p. 32).

The technical problems are diverse. To the lawyer, most of the problems revolve around the nature of Crown resource interests. Are they proprietary interests? What are the consequences of "compliance with laws" clauses[12] in Crown tenures?[13] Does the general statutory expropriation regime apply to takings or deletions from Crown tenures or do special rules apply? Do tenure holders have renewal rights and what discretion might the Crown have as to the terms of renewals? What are the consequences of Crown royalty and stumpage charges for calculating the compensation entitlement of operators? It is clear that the Commission found the Canadian law on these matters to be less than enlightening (p. 42), and with good reason, for it lacks normative bite and is largely an *ad hoc* response to particular questions.

From an economic perspective, the problems of calculating compensation are equally difficult, even if one is able, on the basis of reflection on the underlying philosophical underpinnings and public policy objectives, to agree upon an appropriate measure. The Commission notes that one can solve demoralization and fairness problems by paying the reservation price, and that market value will provide an acceptable measure of the reservation price. (The commission defines "reservation price" (p. 22) as "the amount of compensation which leaves the private property owner indifferent about the taking.") Yet even if this sounds straightforward (p. 55):[14]

> Problems emerge ... when there is no deep, transparent market for the taken property from which to draw a market comparable. This is a particularly intractable problem with respect to natural resources because they are by their very nature, heterogeneous and in the case of minerals, unknown until exposed.

The Supreme Court of Canada, quoting the Ontario Court of Appeal, put it this way in *Lac Minerals Ltd v. International Corona Resources Ltd.*:[15]

> ...there is no question but that gold properties of significance are unique and rare. There are almost insurmountable difficulties in assessing the value of such a property in the open market..... The profitability of the mine, and accordingly its value, will depend on the ore reserves of the mine, the future price of gold from time to time, which in turn depends on the rate of exchange between the U.S. dollar and the Canadian dollar, inflationary trends, together with myriad other matters, all of which are virtually impossible to predict.

All of these sources of uncertainty, observed the Commission, result in a search for other methods for determining the reservation price, amongst them cost-based valuations. Using this approach, we enquire into the sum (present value) of all the economic costs incurred on the property[16] (p. 59).

Public resource properties also pose nice problems associated with the entitlement to, and calculation or determination of, economic rents.[17] If, the argument goes, rents are truly surplus and need not be accorded to the operator in order to attract or retain investment, then the operator has no entitlement to these rents. They "belong to the commonweal and not to the resource interest holder (p. 57)."[18] Consequently, a Crown resource operator need not be compensated for their loss. That argument has tremendous appeal on utilitarian grounds, yet it does little to resolve the almost intractable problems of calculation.

Equally, however, payment of the reservation price may also over compensate if it fails to take into account the problem of regulatory risk. "Regulatory risk" might be defined as the risk that the property will be expropriated or that a mineral explorer will not be allowed to go to production. Risks such as this, like the risks posed by "compliance with laws" clauses, ought to affect the expectations of the tenure holder thereby weakening the property right as well as the utilitarian argument for compensation. If compensation is always paid at the reservation price, a tenure holder will be indifferent to this regulatory risk, thereby **encouraging** investment in areas that may be subject to taking.[19]

The Commission's Recommendations

We have already hinted in the last section at some of the Commission's conclusions and we are now in a position to summarize the Commission's main recommendations. The Commission divided its analysis between the forest and mining sectors. In summary, the Commission proposed three different methods of determining appropriate compensation. In the case of forestry interests, the Commission would award compensation on the basis of costs incurred in relation to investments already made by the operator. In the case of minerals, a distinction was made between exploration properties and producing properties. For exploration properties, compensation was to be payable

on the basis of costs incurred while for producing mines, compensation was to be based on market value.

Forestry

The report contains an extensive analysis of the forest tenure system in British Columbia from which the Commission drew three main observations. The first was that the two main types of tenure, tree farm licences and forest licences, created investment-backed expectations insofar as they accorded operators access to public timber rights in return for commitments to construct and operate processing facilities. "This implies a requirement for compensation in the event of a taking" (p 104). Second, timber tenures issued under the *Forest Act* explicitly contemplate that the Crown is entitled to collect any available resource rents by levying stumpage fees: "literally the value of the tree on the stump before the application of human effort" (p. 105). Even if these rents were not in fact being collected by the Crown, they could (p. 108)[20] "not belong in any formal sense to the tenure holder. Therefore uncollected rents should not be viewed as a compensable loss in the event of a taking." Third, account had to be taken of the special provision in s.53 of the *Forest Act* that permits 5% of rights to be removed without compensation during certain periods, called "deletion" periods.

In light of these observations, the Commission was of the view that the interest holder should be entitled to compensation for both the loss of resource-specific investments (e.g. logging roads) that might be rendered unusable, as well as losses flowing from a reduction in timber supply that resulted in the operator incurring costs from lower capacity utilization. The Commission did not consider it to be appropriate to determine compensation on the basis of the market values of the timber tenures for two reasons: first, because of the absence of an active market for the exchange of harvesting rights, and second, because of the potential inclusion in those values of uncollected resource rents.

Compensation for the loss of a resource-specific investment might be based on the cost of the investment, where appropriate on a prorated basis. In the case of costs resulting from lower capacity utilization, the determination of compensation would be more complex. Some guidance is offered; the Commission indicated that one should have regard to the life of the asset (e.g. the particular processing facility; there is no need to compensate when the asset has served out its useful life) and that government should be encouraged to look for innovative ways to delay the loss of timber rights or to provide an additional supply, not in perpetuity, but over the remaining life of the asset, so as to maximize its utilization. Additional supply might be obtained through intensive silviculture of remaining lands, and compensation therefore might be payable in the form of government funding of such an incremental program. Finally, on the coast, alternative supply might be obtained from the Vancouver log market, and the operator might be compensated on that basis.

Similar flexibility was urged when dealing with forest licences in public timber supply areas where the effect of a withdrawal would be to reduce the annual allowable cut (AAC). While one possibility would be to prorate this reduction across all licensees (and this might well be non-compensable because of s. 53 of the *Forest Act*), a more cost effective measure might be to propose the retirement of the least costly tenure at the expense of the other licensees in the supply area rather than condemning them all to sub-optimal operations (p. 118-119).

In conclusion, therefore, in relation to forestry interests the Commission's recommendations focused very much on compensating investment-backed expectations. Loss of wood supply was to be compensable insofar as it deprived processing facilities or other investments of their value or rendered those facilities more expensive to operate. The value of the standing timber is not compensable in the Commission's view because the Crown is entitled to recover that value through stumpage.

Mineral Interests

For reasons that are not entirely clear, the Commission took a significantly different approach to the appropriate principles to be used in relation to minerals. The Commission drew attention to the site-specific nature of mineral investment, but that cannot explain all the differences in approach. This is evident from the Commission's analysis of the two tenure schemes. In relation to the labyrinthine forest tenure scheme, the Commission took the

status quo as a given, making only minor recommendations for change. The Commission was far more critical of the mineral tenure system observing that (p. 130): "compensation policy for mineral interests is confounded by ambiguities in the province's mineral policy." The Commission went on to recommend that the tenure system (specifically the relationship between the claim and the lease) be amended so as better to reflect the realities of moving from exploration to production. In addition, the Commission consistently downplayed the significance of the claim.[21]

The difficulties of valuing mineral exploration properties, combined with the Commission's view as to the limited rights that should be accorded by a claim, led the Commission to recommend that compensation for exploration properties should be based upon exploration costs incurred rather than the market value of the property. The Commission recognized that this would not be free from shortcomings (p. 133): "non-productive exploration will be compensated; compensable costs must be defined; moral hazard is introduced; and a line must be drawn between exploration properties and advanced properties." I do not have the space to flesh out the Commission's cost-based proposals in detail. Suffice it to say that the Commission believed that cost estimate could be based upon the annual filing of work requirements and that work older than 5 years should not be counted.

Mature[22] properties were to be dealt with quite differently. The Commission took the view that compensation for advanced properties should be market-based. The difference in approach reflected the stronger nature of the property right, the need to avoid demoralization costs and unfairness, and the more tractable nature of the market valuation of mature properties.

There is one other noticeable difference between the Commission's treatment of forest and mineral tenures. As I have already indicated, the Commission, in dealing with forest tenures, was at pains to point out that the tenure holder has no entitlement to uncollected rents. In part this justified the Commission's focus on investment-backed expectations rather than on the market value of timber rights (p.107).[23] This issue is entirely ignored in the mineral sector of the report, but surely the same principle should apply, even if the Crown Government chooses to collect its rents through mineral taxes or some other such means rather than through the device of stumpage. The commonweal argument retains its bite even if the calculation problems may be almost intractable.

In light of these differences of approach one might ask whether the expropriation of mineral interests would admit of the same type of analysis Schwindt applied to forestry operations? In the case of a forestry operation, Schwindt would, as we have seen, accord compensation to all investment-backed expectations including plant investments, road construction etc. Compensation would be tied to the life of the capital assets and would be payable when alternative methods of providing a lumber supply were not available.

In the case of an operating mine, alternatives to compensation would be inappropriate because of the uniqueness of mineral deposits, i.e. there would be no alternative ore supply. Instead, the analysis might go something like this: if we begin with investment-backed expectations, it would be reasonable to compensate on the basis of the discounted stream of earnings that would be generated by the capital investment in place at the time of expropriation. This calculation would not take into account all revenues that might flow from the full development of the deposit where that would assume further capital investment in the future, for that would go beyond compensating investment-backed expectations. It is true that this deprives the operator of an option that it would otherwise have had to develop the property, but the market value of that option depends on the failure of the Crown to recover resource rents, and that is not something to which an operator has an entitlement.

It is even more difficult to apply this sort of analysis to an exploration property. This is because the property is not capable of producing a stream of earnings from existing investments without a series of assumptions as to its future development. One moves by necessity from a consideration of **investment-backed** expectations, to predictions as to the future. Schwindt recognized this problem and therefore focused on costs incurred. The chief difficulty with this approach is that it may result in over compensation where the

exploration has turned up nothing of value. That is always a risk for the mineral explorationist and it is difficult to see why, on utilitarian or other grounds, there should be a need to compensate in those situations. Indeed, to do so would encourage exploration in those areas thought to be candidates for expropriation.[24]

Conclusions

One consequence of the absence of constitutional protection of property rights in Canada has been that our courts and legislators have been reluctant to engage in a normative discussion as to the appropriate principles of compensation for expropriation. Yet the issues of constitutional protection and of the ethical basis for compensation are separable, and even if one does not accept Schwindt's conclusions, one can applaud the willingness of the provincial government to initiate a debate on these matters and to seek advice in developing a coherent and principled approach.

How successful the Commission has been is another matter. To be useful, principles need to be generalizable and yet the Commission has approached the two resource sectors quite differently, giving us, in effect, three different approaches to determining compensation. The one constant is that on grounds of fairness and utility, compensation should be payable for expropriations in either sector.

We should, however, be careful of directing all our attention at the position of the resource rights holder. Equally deserving of attention are the persons whose employment and livelihoods are affected by public resource withdrawal decisions. Our legal system may deny these people the protection of property entitlements, but it is difficult to deny them the reality of their social and economic dislocation and the frustration of their expectations.

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Notes

1. Report of the Commission of Inquiry Into Compensation for the Taking of Resource Interests, Richard Schwindt, Commissioner, n.p., 1992.

2. *R. in right of British Columbia* v. *Tener and Tener*, [1985] 3 W.W.R. 673 (S.C.C.), [1982] 3 W.W.R. 214 (C.A.), 23 B.C.L.R. 309 (B.C.S.C.). For comments on the S.C.C. decision see Barton, (1987), 66 Can. Bar Rev. 145. For comment on the trial decision see Martin, "Land Withdrawals: Government Needs Versus Vested Rights" in Bankes and Saunders (eds.) *Public Disposition of Natural Resources*, Canadian Institute of Resources Law, 1984 at pp. 129-148.

3. The Canadian Constitution and the interpretive case law is not entirely silent on the topic of government takings. One might extract the following propositions:

(1) the federal government may expropriate provincial Crown lands for a legitimate federal purpose, provided that there is a sufficient nexus between the taking and a head of power: *A.G. Quebec* v. *Nipissing Central Ry Co.*, [1926] A.C. 715 (P.C.), *Reference re Proposed Federal Tax on Exported Natural Gas*, [1982] 5 W.W.R. 577 at 618-620 (S.C.C.);

(2) the federal government does not have the right to use its regulatory powers derived from a head of s.91 so as to deal with the property of a province as if the administration of the property had been entrusted to the federal government: *A.G. Canada* v. *A.G. Ontario*, [1898] A.C. 700 (P.C.), *St. Catherine's Milling and Lumber Co* v. *R.* (1888), 14 A.C. 46 (P.C.);

(3) a provincial government may not take federal Crown lands directly or indirectly: *The Prudential Trust Company* v. *The Registrar, The Land Titles Office, Humboldt Land Registration District*, [1957] S.C.R. 658 at 660 per Rand J., but it may expropriate the assets of federally incorporated companies: *Churchill Falls (Labrador) Corporation et al v. A.G. Newfoundland et al* (1984), 8 D.L.R. (4th) 1 (S.C.C.);

(4) a provincial government may not expropriate land within the province where the expropriation in question is effected by legislation that can be characterized as a colourable attempt to interfere with extra-provincial property rights: *Churchill Falls, id.*

(5) the Natural Resources Transfer Agreements and the respective Terms of Union may provide constitutional protection against one or the other level of government for certain rights: Bankes, "Constitutional Intergovernmental Agreements and Third Parties: Canada and Australia" (1992), 30 Alta. L. Rev. 524.

Unlike the Australian Constitution (pl. 51(xxxi)), our Constitution is silent on the payment of compensation.

4. *A.G.* v. *DeKeyser's Royal Hotel*, [1920] A.C. 508 at 542 (H.L.), *Tener*, at 681 *per* Estey J., and *Manitoba Fisheries* v. *R.*, [1979] 1 S.C.R. 101.

5. The court did offer some guidance. Estey J. (at 685) was of the view that in determining compensation, one would begin with the valuation of the right pursuant to the mineral regulations, while the regulations under the Park Act (that limited the value of the mineral right) would be relevant to the determination of compensation. What had been lost in his view was the right of access which must "represent the total value of the minerals less whatever value may be attributed to the future possibility of the issuance of a removal permit."

6. Not that one could conclude from this that the problems were easy to resolve. For hints at some of the difficulties see: *Schatroph* v. *R. in right of British Columbia* (1987), 11 B.C.L.R.(2d) 198 (S.C.).

7. S.C. 1992, c.23.

8. Commission on Resources and the Environment, *Interim Report on Tatshenshini/A'sek Land Use, Volume One - Report and Recommendations*, 1993, at 7 and 96. I owe the reference to Steve Kennett.

9. See *Schatroph, supra*, note 6, *Cream Silver* v. *B.C.* (1991) 62 B.C.L.R.(2d) 62 (S.C.) *Casamiro Resources Co.* v. *A.G.B.C.* (1991), 55 B.C.L.R. 346 (C.A.).

10. The Report is generally well and clearly written but it does occasionally, as here, display the haste with which it was prepared. Does Schwindt mean that the compensation paid was less than the settlement costs of **each** of the three players or of their collective costs? Are the costs of government and the taxpayer different, and if so how?

11. See the discussion of fairness at 33. The Commission seems to have been influenced by the seminal article of Frank Michelman "Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law" (1967), 80 Harv. L. Rev. 1165. Michelman in turn was clearly influenced by early writings of Rawls, later developed in *A Theory of Justice*, Harvard U.P., 1971.

12. A "compliance with laws clause" is a contractual provision in a Crown tenure that incorporates, as terms of the contract, provincial laws as they may change from time to time. The very rights that are vested are therefore themselves subject to change; a factor that ought to affect the expectations of the tenure holders.

13. The term "Crown tenure" is a compendious term used to describe the full variety of contractual and proprietary arrangements that private parties enter into for Crown resources: e.g. mineral claims, leases, Crown granted mineral claims, TFLs, timber licences etc.

14. The Commission also discussed the problems associated with determining market value based upon discounting a future stream of net revenues concluding that (at 59): "application of the income method of valuation to highly volatile resource industries is fraught with difficulty."

15. (1989), 61 D.L.R.(4th) 14 at 49 (S.C.C.). At this point the court was dealing with the calculation of damages for breach of a fiduciary duty or confidential relationship, but the general point remains valid. See also *Reid Newfoundland Co. Ltd.* v. *Minister of Public Works and Services* (1983), 28 L.C.R. 157 (Newf. C.A.), acquisition of mineral title for Gros Morne and Terra Nova National Parks.

16. *Id.*

17. The term economic rent or resource rent is used here to refer to the difference between the value of the resource in or on ground, and the value of the resulting products in the market. Rents will vary from property to property because some natural endowments are more productive than others.

18. "The essential principle of property being to assure to all persons what they have produced by their labour and accumulated by their abstinence, this principle cannot apply to what is not the produce of labour, the raw material of the earth. If the land derived its productive power wholly from nature, and not at all from industry, ... it not only would not be necessary, but it would be the height of injustice, to let the gift of nature be engrossed by individuals." J.S.Mill, quoted in Michael Crommelin, "Government Management of Oil and Gas in Alberta" (1975), 13 Alta. L. Rev. 146 at 146.

19. For a nice example see *Schatroph, supra*, note 6, where the plaintiffs continued to acquire lands for speculative purposes in an area that they knew would be set aside as a park.

20. Interestingly the Commission took the same position with respect to the "old temporary tenures" (OTTs) that are subject to a royalty and not stumpage. Royalty rates have traditionally been held below stumpage, but since the Crown could have brought these charges into line in order to collect the full available rent, the Commission (at 122-23) took the view that uncollected rents should not be factored into compensation for these OTTs.

21. For example it makes the observation (at 128) that the mineral claim was never "intended to provide the holder with an option value (i.e. to give the holder the option of mining or not mining)." If I understand this comment correctly it would seem to deny the claim holder the right to move from exploration to production; yet without this entitlement, who would invest in anything other than grass roots exploration? It is not enough to say that the claim is intended to prevent claim jumping i.e. to prevent another reaping where you have sown (to paraphrase the United States Supreme Court in *International News Services* v. *Associated Press* (1918), 248 U.S. 215), it is intended ultimately to provide you with the option of reaping. The rights accorded by the claim are positive as well as negative.

22. The Commission uses the term "advanced properties" (p. 134). In doing so it recognizes the need for definitional clarity. In its view, that might be achieved by a clearer distinction between the claim and the lease, "where securing the lease required evidence of a commercially valuable mineral deposit" (p. 134).

23. "A second problem with the use of market values is the potential inclusion in those values of uncollected resource rents."

24. The problem of moral hazard again. See text to note 20, *supra*.

Off-Site Mitigation: A Canadian Perspective

*by Judith B. Hanebury**

Off-site mitigation occurs when the purchase or establishment of a habitat at another location is required as a mitigation measure to replace a habitat altered or destroyed as a result of a proposal. It is based on the concept of "no net loss" of important habitat such as wetlands and fisheries or wildlife habitat. "No net loss" means that habitat losses must be off-set by gains.[1]

With the imminent proclamation of the *Canadian Environmental Assessment Act*[2] (*CEAA*), the use of off-site mitigation will likely increase, as it will be legislatively sanctioned. An examination of American case law on mitigation measures implemented under the *National Environmental Policy Act*[3] (*NEPA*) indicates some of the issues that may arise when off-site mitigation is utilized to render the environmental effects of a proposal insignificant. This article will examine the Canadian and American experiences with off-site mitigation and consider whether the issues that have arisen in the American context could occur with the implementation of the *CEAA*.

The Canadian Experience

Under the *Environmental Assessment and Review Process Guidelines Order*[4] (*EARP Guidelines Order*), "mitigation" is not defined. The federal authority undertaking the assessment is required, pursuant to S.14 of the *EARP Guidelines Order*, to ensure the implementation of "mitigation or compensation measures" that could prevent any of the potentially adverse environmental affects of the proposal from becoming significant. Despite the fact that the *EARP Guidelines Order* does not directly refer to off-site mitigation,[5] the recommendations of review panels have sometimes included such measures.[6] There has been little Canadian case law on the question of mitigation measures,[7] and none on the question of off-site mitigation.

The federal Department of Fisheries and Oceans included fish habitat development as part of its official management policy in 1986.[8] The guiding principle of the policy is that there should be no net loss of the productive capacity of habitats.[9] The Department seeks to balance unavoidable habitat losses with habitat replacement on a "project by project basis". The first option is to replace the natural habitat at or near the site. The second option is to move off-site with the replacement habitat.[10] Any costs associated with undertaking mitigation or compensation measures, including the cost of operating or maintaining any such facilities, are to be the responsibility of the proponent of the project.[11]

Such measures are sometimes implemented through "compensation agreements" which are signed by the proponent. The agreement can provide for the posting of a performance bond and the on-going monitoring of the re-created habitat. Although it is the practice of the Department to enter into the arrangements directly with the proponent, in some instances the courts have ordered that compensation occur through the intervention of a third party, such as a conservation group.[12]

The *CEAA* defines "mitigation" (s.2(1)) to mean:

Résumé

Les mesures d'atténuation "hors site", basées sur le concept d'absence de perte nette, impliquent le remplacement d'un habitat détruit ou modifié par un habitat semblable, soit existant, soit à recréer. Elles sont reconnues comme mesures d'atténuation par la *Loi canadienne sur l'évaluation environnementale*, qui doit être promulguée au mois de juin 1993. L'expérience américaine a révélé l'existence de deux problèmes liés à l'utilisation de mesures d'atténuation hors-site. En premier lieu, ces mesures ne diminuent pas l'importance d'un effet environnemental négatif. Le même problème se poserait sous le régime de la *Loi canadienne sur l'évaluation environnementale*. En deuxième lieu, il n'est pas possible d'imposer l'application de mesures d'atténuation hors-site comme condition d'une autorisation lorsque d'autres niveaux de juridiction sont impliqués. En vertu de la nouvelle législation canadienne, la même position pourrait être adoptée par les tribunaux. Dans ce cas, l'alternative serait soit le rejet des projets, soit leur renvoi à un médiateur ou à une commission d'examen fédérale ou conjointe.

"In respect of a project, the elimination, reduction or control of the adverse environmental effects of the project, and includes restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means."

Under the *CEAA*, where a federal authority is prepared to allow a project to proceed with mitigation measures, it "shall ensure that any mitigation measures that the responsible authority considers appropriate are implemented" (s.20(1)(a)). With compensation and replacement specified as mitigation measures, it is likely that these alternatives will be presented with increasing frequency as methods of ensuring that environmental effects are not significant. It has been the American experience that off-site mitigation is not a problem free solution to habitat destruction or alteration.

The American Experience

The *NEPA* governs federal environmental impact assessment in the United States. It requires federal agencies to consider the potential environmental impact of proposed federal actions. The federal agency must prepare an environmental assessment describing the potential impact on the environment of the proposal. The agency may then decide that a more comprehensive environmental impact statement (EIS) must be prepared or, alternatively, it may make a finding of no significant impact (FONSI).[13] Federal agencies commonly require the adoption of mitigation measures to minimize significant environmental impacts so that they can issue a FONSI.[14] Traditionally, agencies altered the proposed plans with on-site mitigation techniques. More recently, off-site mitigation measures have been used to support a FONSI and permit the project to proceed without an EIS.[15]

Off-site mitigation measures can involve the creation of replacement habitat at another location, so that, for example, natural wetlands which have been altered, degraded or eliminated are replaced with man-made wetlands. Alternatively, off-site mitigation can involve the purchase of a similar pre-existing ecosystem with the result that one ecosystem is destroyed and one remains, protected from future degradation.[16] Despite the obvious flaws inherent in such mitigation techniques,[17] there is no statutory framework that outlines standards or criteria for off-site mitigation measures.[18] This lack of specific guidelines or a clear statutory mandate has been criticized.[19] Off-site mitigation is seen to be an easy out for agencies that are over-worked, for it appears to maintain the *status quo*.[20]

Perhaps as a result of these concerns, in a paper entitled "Forty Questions", the federal Council on Environmental Quality attempted to provide a workable framework for the establishment of off-site mitigation guidelines.[21] "Forty Questions" presumed that agencies would prepare an EIS whenever off-site mitigation was contemplated.[22] Despite that presumption, off-site mitigation has been used to justify a FONSI so that a project can proceed.[23]

These comments illustrate the first issue that has arisen with federal agency reliance on off-site mitigation. An off-site mitigation plan, quite simply, cannot justify a FONSI for it does not render the environmental impacts at the site of a proposal insignificant. It merely replaces lost resources with either man-made resources or existing resources at another site. A man-made wetland, for example, cannot duplicate exactly the myriad of life forms that existed in the degraded wetland. The purchase and protection of an existing wetland presumes that it is identical or similar to the degraded wetland. Furthermore, substituting the purchased wetland for the damaged wetland ignores the fact that the former may be worthy of protection in its own right rather than as a substitute resource.

A second issue that had surfaced in relation to the use of off-site mitigation by federal agencies was considered most recently in the United States Supreme Court decision of *Robertson* v. *Methow Valley Citizens' Council*.[24] This case examined, in part, the issue of whether off-site mitigation could involve non-federal government agencies. It arose out of the federal Forest Services' decision to issue a special use permit authorizing the development of a major ski resort at Sandy Butte in Washington State. One of the concerns addressed in the environmental impact statement was the adverse effect of the project on area wildlife, particularly on the mule deer herd that used the proposed site and the surrounding area. The Forest Services' study discussed a number of mitigation measures including the acquisition and management by local government of tracts of land critical for the continuation of the herd. Specifically, it suggested that conservation easements be encouraged between private

individuals and agencies such as the Washington Department of Game. Issuance of the special use permit was conditional on the execution of an agreement by the Forest Services, the State of Washington, and Okanogan County outlining mitigation measures aimed at herd preservation.

The Court noted that the off-site environmental effects on the mule deer herd could not be mitigated unless non-federal government agencies took appropriate actions. The Court found that since it was State and local governmental bodies that had jurisdiction over the area in which the adverse effects needed to be addressed, and since they had the authority to mitigate those effects, the local agencies, not the Forest Services, had to reach a final conclusion on what mitigation measures were necessary and the Forest Services did not have to wait for this to occur.[25] The Court went on to find that *NEPA* required an examination of mitigation measures in sufficient detail to ensure a fair evaluation of the environmental consequences of the proposal. It did not require a complete mitigation plan to be formulated and adopted.[26]

This case was met with criticism.[27] The finding by the Court that it would be incongruous for the Forest Services to delay action until local authorities could decide on appropriate mitigation measures[28] is odd, in light of the fact that the Forest Services had entered into a Memorandum of Understanding with State and local authorities which committed the various parties to undertaking certain mitigation measures.[29] For the Court the fundamental problem was likely not delay but rather was the federal agency's attempt to impose mitigation measures upon state and governmental bodies which had sole authority over the mitigation measures. Therefore, the problem for the court was one of jurisdiction.

To summarize the American experience, two issues have arisen in relation to off-site mitigation. The first is that off-site mitigation does not render environmental effects insignificant, with the result that it is difficult to justify a FONSI. The second is the difficulty of formulating and implementing off-site mitigation measures when other jurisdictions control or regulate the off-site area. Will these two issues arise in relation to off-site mitigation measures implemented under the *CEAA*?

Off-Site Mitigation Under the CEAA

Canadian case law under the *EARP Guidelines Order* has not considered whether a finding of insignificant environmental effects after mitigation can be based on the implementation of off-site mitigation measures. The *CEAA* provides for environmental assessment findings to be made at two different stages of the assessment process. The first occurs subsequent to a screening report. The federal authority undertaking the assessment, after taking into account the implementation of any mitigation measures it considers appropriate, can find that the project may proceed without further assessment as it is not likely to cause "significant adverse environmental effects (s.20(1)(a))." If the federal authority finds that the project is likely to cause significant adverse environmental effects that could be "justified in the circumstances", it shall refer the project to the Minister of the Environment for referral to a mediator or a review panel (s.20(1)(c)(ii)). It is only after receipt of the mediator or review panel report that the federal authority can make a finding that the project "is likely to cause significant adverse environmental effects that can be justified in the circumstances (s.37(1)(a)(ii))."

The first issue identified with the use of off-site mitigation under *NEPA* can occur as well under the *CEAA*. As with assessments under *NEPA*, it can be argued with assessments under the *CEAA* that the replacement of habitat which suffers significant adverse environmental effects does not render those effects insignificant. For as has been pointed out in the American literature,[30] the creation of new habitat destroys an already existing environment of an another kind or type, and the purchase of new habitat merely results in the preservation of one habitat, not two. The purchased habitat may have been preserved in any event from development, should development have been sought at a future date. Furthermore, the creation of new habitat presumes that a new ecosystem can be man-made or that animals will move from a damaged habitat to a "preserved" habitat.

Where environmental effects are significant, the use of off-site mitigation can only be justified if a proposal goes to a review panel or mediation. At that point the federal authority is capable of deciding that the significant

environmental effects can be justified in the circumstances. Those circumstances could include the mitigation measure of habitat replacement. It remains to be seen whether Canadian courts will follow the example of American courts and permit significant environmental effects to be rendered insignificant as a result of off-site mitigation.

The second issue noted in American jurisprudence, the jurisdictional question of the implementation of off-site mitigation measures by the federal agency undertaking the assessment, is more difficult to assess in a Canadian context. The United States Supreme Court, in *Robertson* v. *Methow Valley Citizens' Council*[31] found a federal agency could not impose off-site mitigation measures in areas of state jurisdiction involving state or local agencies. The Court also found that *NEPA* was procedural in nature and did not require the imposition of mitigation measures at all, only their consideration. The *CEAA* requires the implementation of mitigation measures unless a significant environmental effect can be justified (s.20).

The Supreme Court of Canada, in the decision of *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*[32] found that a federal environmental assessment can consider the effects of the proposal on areas of provincial jurisdiction.[33] Although La Forest J. indicated that environmental considerations within the purview of the province "may validly be taken into account in arriving at a final decision"[34] on whether or not to grant an approval, he did not consider the question of how far mitigation measures could encroach into areas of provincial jurisdiction. To use his example, he found that in deciding to authorize the construction of a new railway line, the relevant federal agency could consider the fact that it would traverse ecologically sensitive habitats, such as wetlands and forests, being within a province.[35] Laforest J. thus implies that the proposed route could be refused because of environmental considerations within provincial jurisdiction. Rather than refusing the line, could the federal decision making authority require, for example, the purchase of replacement habitat or the establishment of a provincial wildlife area? This question was not considered by the Court, nor has it been addressed in the *CEAA*.

Subsection 20(2) of the *CEAA* seeks to give the federal authority undertaking an assessment wide powers to implement mitigation measures. It provides that where the federal authority finds that the project may go ahead, because the project is not likely to cause significant adverse environmental effects with the implementation of mitigation measures, the responsible authority shall ensure that any mitigation measures are implemented. This is to occur "notwithstanding any other Act of Parliament". Although this section may get around the question of the limitation of mitigation measures to measures already mandated under the federal authority's enabling statute,[36] it cannot be suggested that this section is sufficient to permit a federal responsible authority to alter the jurisdictional division of powers granted in the *Constitution Act, 1867*.

The question of how far, if at all, a federal responsible authority can encroach into areas of provincial jurisdiction when implementing mitigation measures is, therefore, unanswered. This question becomes particularly acute when looking at off-site mitigation. Although the Canadian courts, like their American counterparts, may hold that mandatory mitigation measures in provincial areas of jurisdiction cannot be imposed by a federal authority, the issue is of limited practical significance. The Supreme Court of Canada has established the right of the federal authority undertaking an assessment to consider the environmental effects of the proposal on areas of provincial jurisdiction. If it is outside the federal authority's jurisdiction to impose the necessary mitigation measures to render those effects insignificant, the proposal must be refused or referred to the Minister of the Environment for mediation or a panel review to decide if those effects can be justified. Alternatively, the Minister could undertake a joint panel review and sidestep the jurisdictional issue. A wise proponent, therefore, would ensure that the proposal is filed with such mitigation measures already in place, so that the question of the ability of the federal responsible authority to impose those measures does not arise.

Conclusion

Off-site mitigation is a concept that appears initially appealing. From the American experience two issues have arisen as a result of its utilization as a mitigation measure in environmental impact assessments. First, it does not render a significant environmental

effect insignificant. The same issue can arise under the *CEAA*. Second, there is no ability to condition an authorization with the implementation of off-site mitigation where other levels of jurisdiction are involved. Under the new Canadian legislation the same approach may be taken by the courts. The alternative, however, is the rejection of proposals or their referral to a mediator or to a federal or joint panel review.

* *Judith B. Hanebury is Counsel at the National Energy Board. The opinions expressed are those of the author and not necessarily those of the National Energy Board.*

Notes

1. M.R. Deland, "No Net Loss of Wetlands: A Comprehensive Approach" (Summer 1992) Nat. Resources and Env., 3 at 5.

2. This bill, C-13, is expected to be proclaimed in June 1993.

3. *National Environmental Policy Act of 1969*, codified as amended at 42 U.S.C.S. 4321-4370A (1988).

4. SOR/84-467.

5. Background documents have interpreted "compensation measure" to include off-site mitigation measures. See FEARO, "Initial Assessment Guide" (Minister of Supply and Services: 1986) at 25, 26.

6. See, for example, Environmental Assessment Panel, *Report on Banff Highway Project* (Ottawa: Minister of Supply and Services Canada, 1979) at 54, Rec. 5.2(3) (development of ungulate habitat) and Environmental Assessment Panel, *Report on Roberts Bank Port Expansion* (Ottawa: Minister of Supply and Services, 1979) at 24, (refusal to recommend proposed eel grass transplants and new fish habitat). Both of these panel reviews occurred under an earlier version of the *Guidelines Order*.

7. See *Curragh Resources Inc.* v. *The Queen in right of Canada* [1992] 87 D.L.R. (4th) 219 (F.C.T.D.); and, *Canadian Wildlife Federation Inc.* v. *Canada (Minister of the Environment)* [1990] 4 C.E.L.R. (N.S.) 201 (F.C.T.D.).

8. Department of Fisheries and Oceans, *Policy for the Management of Fish Habitat* (Communications Directorate: 1986) at 12.

9. *Ibid.* at 12.

10. *Ibid.* at 23, 24.

11. *Ibid.* at 24.

12. *R.* v. *Petro-Canada* (28 October 1992), (B.C.P.C.) [unreported]; *R.* v. *Bell Pole Co. Ltd.* (3 March 1992), (B.C.P.C.) [unreported].

13. s. 20(1)(a).

14. *Supra*, note 4.

15. 42 U.S.C.S. 4332 (2) (C) 1988, and 40 C.F.R.S. 1500.1(b), 1501.4(b).

16. See E. Glitzenstein, "Project Modification: Illegitimate Circumvention of the E.I.S. Requirement, or Desirable Means to Reduce Adverse Environmental Impacts?" (1982) 10 Ecology L.Q. 253.

17. M.R. Bulson, "Off-Site Mitigation and the E.I.S. Threshold: NEPA's Faulty Framework" (1992) 41 J. of Urban and Cont. Law 101 at 105.

18. *Ibid.* at 106-07.

19. In the former case, land is being altered and its primary use destroyed to create another kind of use, and in the latter case, only one ecosystem remains where two previously existed.

20. *Supra*, note 18 at 108. See (1990) 40 C.F.R., s. 1508.20 which defines mitigation to include:
"(a) Avoiding the impact altogether by not taking a certain action or parts of an action.
(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
(d) Reducing or eliminating the impact over time by preservation and of the action.
(e) Compensating for the impact by replacing or providing substitute resources or environments."

21. *Supra*, note 18 at 111. *Infra*, Jan Goldman-Carter, "New Legislation 'Not Business as Usual'" (Jan-Feb 1989) 6 Env'tl Forum at 20.

22. *Supra*, note 18 and Goldman-Carter, *ibid.* at 112.

23. Forty Most Asked Questions Concerning CEQ's *National Environmental Policy Act* regulations, 46 Fed. Reg. 18,026 18,038 (1981).

24. It has been suggested that CEQ regulations be amended to require the mandatory preparation of an EIS for any proposals involving off-site mitigation unless certain criteria are met. See *supra*, note 18 at 121 *et seq.*

25. *Supra*, note 18 at 105 and see, for example, *Friends of the Earth* v. *Hintz*, 800 F. 2d 822 (9th Cir. 1986); *Missouri Coalition for the Environment* v. *United States Corps of Engineers*, 678 F. Supp. 790 (U.S.D.C. 1988), affirmed, 866 F. 2d 1025 (8th Cir.), cert. denied, 490 U.S. 820 (1989).

26. (1989) 109 S. Ct. 1835.

27. *Ibid.* at 1847.

28. *Ibid.* at 1847.

29. D.C. Richards, "*Robertson* v. *Methow Valley Citizens' Council*: The Grey Area of Environmental Impact Statement Mitigation" (1990) 10 J of Energy L. and Policy 217.

30. *Supra*, note 27 at 1847.

31. *Supra*, note 30 at 226-27 where the author points out the purpose of such agreements is to resolve the jurisdictional uncertainties.

32. s. 20(1)(a).

33. *Ibid.* at s. 20(1)(c)(ii).

34. *Ibid.* at s. 37(1)(a)(ii).

35. *Supra*, note 18.

36. *Supra*, note 27.

37. *Supra*, note 3, s. 20.

38. [1992] 2 W.W.R. 193.

39. *Ibid.* at 241.

40. *Ibid.* at 239.

41. *Ibid* at 239.

42. This may be in response to the *Curragh* case, *supra*, note 7.

Recent Developments in Canadian Oil and Gas and Mining Law

*by Susan Blackman**

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Oil and Gas

Joint Ventures -- Liability of Parent Company for Debts of Subsidiary

In the early 1980's two companies (S and O) entered into a letter agreement which created a joint venture to explore for petroleum in the Sudan. The letter agreement contemplated a future joint operating agreement, which was subsequently signed by subsidiaries of the parties to the letter agreement. The joint venture proved unprofitable at a time when O Sub and its parent were having financial difficulties. At one point, O Sub sold part of its interest in the project and transferred the proceeds to its parent in payment of a debt. Finally, O Sub defaulted on its obligations under the joint operating agreement. The operator (S Sub) sued O and claimed that O should fulfil the obligations of O Sub.

In the Alberta Court of Queen's Bench, two issues were raised: 1. whether there was an international practice in the petroleum industry whereby parent companies would be liable for the debts of their subsidiaries, and 2. even, if there was no such practice, whether this was a case where the subsidiary and the parent were so intertwined that the law would hold the parent liable. With regard to the practice in the industry, Hunt, J. found that the evidence was inadequate to show that such a practice was so pervasive that the parties must have intended to be bound by it. Evidence was led that showed parental guarantees are sometimes sought. In addition, S Sub could have protected itself by requesting just such a guarantee from O.

With regard to the liability of the parent for the debts of the subsidiary, Hunt, J., examined the relationship between O and O Sub for the purpose of answering questions such as: Were the profits of O Sub treated as the profits of O? Was O the head and brain of O Sub? Although case law suggests six such questions should be asked, Hunt, J. held that positive answers to all six were not determinative of the issue, but the overall context and the interests of justice also must be examined. On the facts, Hunt, J. could not find that commitments made by O Sub were taken by any party to be commitments on behalf of O. In addition, no impropriety on the part of O was apparent. *See*, *Sun Sudan Oil Co.* v. *Methanex Corp.*, [1992] A.J. No. 1003 (QL Systems).

Operating Agreements -- Clauses -- "Area of Mutual Interest"

Luscar Ltd. v. *Pembina Resources Ltd.*, reported in *Resources*, No. 39, has now been reported at 85 Alta. L.R. (2d) 46, 122 A.R. 83.

Mining

Claim Staking Disputes -- Compliance with Staking Requirements -- British Columbia

In *Eurus Resource Corp.* v. *British Columbia (Chief Gold Commissioner)*, [1992] B.C.J. No. 2684 (QL Systems), decisions of the Chief Gold Commissioner of BC cancelling mineral claims were appealed to the BC Supreme Court. All parties consented to the introduction of particular evidence to the court such as the affidavits of the stakers and other persons. Also before the court were the reports of the mineral title inspectors. Although, the court thought an argument could be made as to whether this information was properly before it, the consent of the parties was sufficient to avoid that problem.

Six claims had been staked in a period of two days, in deep snow and inclement weather. All six claims were subject to defects in staking such as total lack of marking of the boundaries of the claim, the legal corner post in a different location than reported on the locator sketch filed with the government, corner posts missing, and metal tags improperly inscribed. There was some dispute as to whether the corner posts were actually placed or subsequently disappeared before the inspectors arrived.

The claims were overstaked and a complaint was made. This triggered an inspection and the

reports of the inspectors showed that most corner posts could have been placed although a few could not because of topographical conditions. The inspectors also thought that most boundaries of the claims could have been totally, or at least partially marked. After reading the reports of the inspectors, the Gold Commissioner cancelled the claims.

The court noted that topographical conditions are a statutorily-prescribed excuse for not completing the staking according to the regulations, but that inclement weather is not.

Hood, J., quoted the Supreme Court of Canada in *Docksteader* v. *Clark* (1905), 36 S.C.R. 622: "[t]he object of the mining Act is to promote the discovery of minerals in the lands of the Crown, and an inducement is held out to persons to search for them by enabling them to secure the exclusive possession of ground or rock in which they may have found minerals and to take the minerals for their own use." Hood, J., adopted this statement as the object and purpose of the *Mineral Tenure Act*, S.B.C. 1988, c.5, and went on to say: "... I think in construing [the Act] every reasonable intendment ought to be made to uphold the validity of a claim where there has been actual discovery and an honest attempt to comply with the directions of the legislature in staking and describing the location of the discovery."

Hood, J., went on to describe the minimum regulatory requirements that must be met: "The locator must sufficiently mark out and identify his claim pursuant to the Regulations so that its original location thereafter can be easily determined with the degree of accuracy which is sufficient in the case of any other claim properly located." If the locator has met that standard then any discrepancies or omissions that exist may be cured under the statute.

At least one requirement that must be met is that the Legal Corner Post must be permanently fixed and not movable, otherwise the claim location is not permanent. In lieu of a fixed LCP, the judge thought that corner posts, identification posts, and marked boundary lines, taken together, could make the correct location of the claim sufficiently obvious and well defined so that a fixed LCP would not be necessary.

Finally, the court held that none of the six claims met even the minimum standard prescribed by the Act and, therefore, the Chief Gold Commissioner's decision was upheld.

Reservation of Land from Staking -- Yukon

Halferdahl v. *Whitehorse Mining District*, reported in *Resources*, No. 39, has been reported at [1992] 1 F.C. 813, 31 F.T.R. 303.

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

Canadian Forest Management Project

The Vancouver Foundation recently became a sponsor of the Institute's Canadian Forest Management Project. The two-year research project will consider the extent and the means by which our political institutions and legal practices are responding to the increasingly complex and conflicting demands being placed on our forests. The principal researcher for the project is Monique Ross.

The following is a complete list of project sponsors to date: the Vancouver Foundation, Alberta Forestry, Lands and Wildlife; Milner Fenerty; McLennan Ross; Forestry Canada; the Alberta Law Foundation; the British Columbia Law Foundation; Alberta Forest Products Association; Fasken Campbell Godfrey; Lang Michener Lawrence & Shaw; and Blue Ridge Lumber (1981) Ltd. Additional sponsors will be announced in future issues of *Resources*.

Companies, firms, and foundations interested in obtaining information about sponsorship of this project or the conference may contact the Institute's Executive Director at (403) 220-3200 or write to:
Canadian Institute of Resources Law, 430 BioSciences Building, The University of Calgary, Calgary, Alberta T2N 1N4. All donations are tax-deductible.

Institute News

• Executive Director Owen Saunders headed a federal-provincial delegation to Russia from March 6-12, as part of a project to review the proposed oil and gas legislation in Russia. The delegation included representatives of Alberta Energy, the Federal Department of Energy Mines and Resources, and the National Energy Board. Institute Board member Alastair Lucas of the Faculty of Law, University of Calgary also participated in the delegation. The preparation of the legislative review was organized by the Institute with the participation of the federal and provincial governments and members of the Faculty of Law, University of Calgary. The visit was carried out as part of the Government to Government initiative funded by the federal Task Force on Central and Eastern Europe.

• Owen Saunders participated in a workshop on "Water Resources and the Middle East Peace Processes", convened by the International Development Research Center in Ottawa on January 18, 1993.

• Monique Ross spoke on "Forest Management and Environmental Review" to the Calgary Environmental Law Subsection of the Canadian Bar Association in February, 1993.

• Janet Keeping will be participating in a conference on April 1 & 2, entitled "Oil and Gas in the Former Soviet Union: Prospects and Opportunities" co-sponsored by the Canada-Russia Business Council and Insight Information. She will be speaking on Russian Oil and Gas Law.

Chair of Natural Resources Law

The Chair of Natural Resources Law was established by the Faculty of Law at The University of Calgary to bring prominent scholars to the University to engage in teaching and research activities. The Institute contributes financially to the Chair.

The Chair for 1993 is Dr. Alberto Székely, a renowned Mexican authority on environmental law. In addition to the practice of environmental law, Dr. Székely is an international legal consultant on the international law of the environment and of natural resources and the law of the sea. Dr. Székely presented a public seminar on March 9, 1993 on the topic of "The NAFTA Agreement and North America as an Ecological Zone".

Contract Law Course

On February 4 and 5, 1993 the Institute presented a Contract Law Course at Calgary's Stampeder Inn. Aimed at non-lawyers who deal extensively with contracts, the course attracted approximately 25 registrants.

The course is conducted by Professor Nicholas Rafferty of The University of Calgary Law School, and Susan Blackman, Research Associate of the Institute. The course may be offered publicly, or in-house to oil company employees.

For more information please contact Pat Albrecht at (403) 220-3974.

New Board Members

The Institute has two new Board members.

Nigel Bankes is an associate professor of law at The University of Calgary where he teaches natural resources law, oil and gas law and energy law. He is currently chairman of the Canadian Arctic Resources Committee and has served as an advisor to several Inuit organizations on matters related to the constitution and land claims.

Madam Justice Constance Hunt has been a Justice of the Court of Queen's Bench of Alberta since December, 1991. She was previously Dean and Professor of the Faculty of Law, University of Calgary and served as Executive Director of the Canadian Institute of Resources Law from 1983-89. She has been previously employed in the petroleum industry and as an adviser to aboriginal organizations.

Recent Visitors

Alex Gardiner, Senior Lecturer in Law, The University of Western Australia, Nedlands, Perth, Western Australia

Readership Survey

The Institute would like to thank everyone who completed and returned our recent readership survey. Anyone interested in receiving a copy of the survey results, should contact Nancy Money, Canadian Institute of Resources Law, 430 Bio Sciences Bldg, The University of Calgary, Calgary, AB, T2N 1N4.

Publications

Instream Flow Protection and Alberta's Water Resources Act, by Steven J. Ferner, 1992, 44 pages. $10.00

This paper is the 1991 winning entry in the Institute's annual national Essay Prize competition. This paper examines five techniques available in Alberta's *Water Resources Act* to protect instream flow. Three changes to Alberta's *Water Resources Act* which would enhance the protection of instream flow are also examined. This paper is a thorough, well-researched piece of work that contributes to the existing literature and will be of great interest to practitioners of water law and environmental law.

Canadian Law of Mining, by Barry J. Barton, 1993 (Forthcoming)

This book contains a comprehensive study of Canadian mining law. From the broad concepts of ownership rights to the intricate details of claim-staking, it covers a variety of topics of interest to both practitioners and non-lawyers in the mining industry across Canada. In addition to practice and procedure, this book also addresses the policy inherent in different systems of disposition of mining interests, especially the free miner system. It covers many other issues important to mining, such as acquisition of rights and interests from the Crown, transfers of mining interests, royalties, withdrawal of lands from mining, surface rights, and mining issues in relation to native lands.

Alberta's Wetlands: Legal Incentives and Obstacles to Their Conservation, by Darcy M. Tkachuk, 1993 (Forthcoming)

This paper examines the direct and indirect effects of the common law, statutes, and governmental policies which impact upon Alberta's wetland resources. Both the older legal instruments that promoted wetland destruction and a new generation of legislation and policies that encourage conservation and preservation are discussed. In addition, a series of recommendations are also made for the elimination of conflicting legislation. This paper is the 1992 winning entry in the Institute's annual national Essay Prize competition.

Environmental Protection: Its Implications for the Canadian Forest Sector, by Monique Ross and J. Owen Saunders, 1993 (Forthcoming)

At the present time in Canada, an expanding body of environmental protection legislation is influencing the *modus operandi* of the forestry sector. The purpose of this report is to provide a comprehensive review of the mechanisms set out in legislative provisions which now govern environmental concerns in Canada and, specifically, to review the way in which these provisions affect forestry activities.

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