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The Environmental Mandate of the ERCB in Well Licence Applications

by Peter McLaws and
Susan Blackman

It is apparent that most of the easily accessible conventional oil and gas pools in Alberta have been tapped. Well licence applications before the Energy Resources Conservation Board (the Board or the ERCB) are now being made for areas that are extremely sensitive ecologically, such as sub-alpine mountain slopes which tenuously sustain increasingly rare populations of native vegetation and wildlife. Encroachment into these areas by drilling operations may threaten the viability of these flora and fauna and simultaneously eradicate areas of pure wilderness. Applications to drill in such areas have resulted in lengthy public hearings with a great deal of associated media attention as increasingly sophisticated public interest groups mount strong opposition to some of these developments. Consequently, the ERCB's approach to environmental problems is now in the spotlight.

The ERCB is the only tribunal in Alberta empowered to hold public hearings at any stage of the development of conventional oil and gas reserves, from the granting of the mineral lease onward. Over the years, in the course of these hearings, the ERCB has assumed an ever-broadening mandate to deal with environmental issues;[1] but just how far can the ERCB go in addressing these concerns in its licencing process?

The ERCB receives its mandate primarily from the *Energy Resources Conservation Act*[2] (ERCA) and, where the drilling of wells is concerned, the *Oil and Gas Conservation Act*[3] (OGCA). Section 2 of the ERCA lists seven purposes, of which six, and arguably all seven, may fairly be said to be concerned solely with promoting the safe, efficient and economic development of the energy resources of Alberta. The one sub-paragraph that might

Résumé

La Alberta Energy Resources Conservation Board (Commission chargée de l'économie des ressources énergétiques de l'Alberta) étend de plus en plus sa compétence en matière environnementale et a décidé qu'elle refuserait une demande de permis de forage d'un puits si les répercussions sur l'environnement étaient inacceptables. Sa compétence au regard de ces puits est définie par la Energy Resources Conservation Act *et la* Oil and Gas Conservation Act *qui visent à conserver les ressources. Ces deux lois autorisent simplement la Commission à exiger que les répercussions sur l'environnement soient atténuées. En dépit de sa propre interprétation, la Commission n'a pas compétence pour refuser un permis de forage d'un puits pour des raisons environnementales. Il existe donc une lacune dans le régime réglementaire de cette province qu'il est urgent de combler.*

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address a wider purpose is s. 2(d) which states that a purpose of the Act is "to control pollution and ensure environment conservation in the exploration for, processing, development and transportation of energy resources and energy." It is noteworthy that pollution is to be controlled, and the environment conserved, at one and the same time as energy resources are exploited. There is no suggestion that this exploitation might be halted in order to control pollution or conserve the environment.

As opposed to the ERCA, which defines the broad mandate of the Board, the OGCA regulates the details of oil and gas development activities in Alberta. The Act lists six purposes in s.4, of which only the sixth has express environmental overtones; it specifically addresses controlling pollution in the drilling of wells but does not in any way suggest a broader concern for the environment.

The provisions mentioned to this point bestow a narrow environmental jurisdiction on the Board, only providing for mitigation of environmental impacts while energy resource development proceeds. However, the Board has asserted that it has the jurisdiction to deny a well licence where the environmental impacts would be unacceptable.[4] Since the above-mentioned provisions point to mitigation of impacts and not to cessation of development, where is the statutory basis for the Board's assertion? The answer lies in s.4 of the OGCA which lists not only specific purposes like the sixth one already discussed but also a more general one referring to the "public interest."

The more general third purpose of the Act is "to provide for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta." The term "public interest", used alone, is potentially broad and wide-ranging. The Board itself, during the course of its public hearings, has interpreted it to be a very broad concept including "...many factors other than the monetary values attributed to a resource."[5]

To resolve the question of when the Board may deny a licence, it is necessary to return to the purposive sections of the ERCA and OGCA. Both Acts are concerned with the conservation of energy resources and with the efficient and economic development of the mineral wealth of the province. Both Acts charge the Board with preventing the waste of energy resources.[6] Both Acts seek to ensure maximum recovery of these resources. Undoubtedly a well licence could be refused if the well in question would somehow work counter to these objectives.[7]

However, could a proposed well which met all the technical requirements for efficient production be refused on environmental grounds alone? We suggest that, based on the identified objectives of the legislation in question, it could not. Pollution is to be controlled, and the environment conserved, during operations to develop energy resources. These operations must be conducted because they are in our public interest. Neither the ERCA nor the OGCA as presently written is intended to serve as environmental protection legislation. Both are resources conservation legislation.

The hardest issue for the ERCB to deal with would arise when a productive subsurface formation could only be drilled from a location that would necessarily entail pollution and environmental degradation. The Board has stated that it could deny the licence, but it is questionable that it has that jurisdiction even in an extreme case. The OGCA clearly contemplates that every well will necessarily involve some pollution, as it speaks of controlling pollution, not preventing it. The environment is to be conserved, *while* drilling and production take place. To "ensure environment conservation" in this context must mean to ensure that exploration for energy is undertaken with due regard for the mitigative measures that can reasonably be used to protect the environment from the negative impacts that inevitably attend such activity.

Support for the above position can be found in *Athabasca Tribal Council* v. *Amoco Canada Petroleum*.[8] In the Alberta Court of Appeal, Laycraft J.A., for the majority, held that the ERCB could only concern itself with social problems which were caused by the project in question and could not require an affirmative action program for native people which would address previously existing social problems in the project area. This restricts the ERCB to consideration of project impacts and their mitigation. In the Supreme Court of Canada, Ritchie, J. writing for the Court did not agree with the Court of Appeal's reasoning but did concur in the result. He first commented on the statutory purposes found in the ERCA:

> It will be seen that the purposes of the Act are *limited to matters concerning energy resources and energy* in the Province of Alberta, considerations which govern the board's jurisdiction.'[Emphasis added]

He then went on to examine the purposes of the OGCA and found them to be similarly limited.[10] In his conclusion, Ritchie J. decided that express legislative provisions would be needed to provide authority for the ERCB to order a proponent to correct previously existing social problems. However, he went on to say:

> In reaching the above conclusion I have not overlooked the argument of the appellant to the effect that the references to 'the public interest' in s. 24(1)(b) of the *Energy Resources Conservation Act* and s. 5(b)(1) of the *Oil and Gas Conservation Act* are of themselves a sufficient indication of the intention of the legislature to endow the board with authority to recommend measures directed towards the development and control of the social welfare of the Indian people. As I have indicated, however, I do not feel that such an interpretation can be attributed to the enabling statutes which are exclusively concerned with the development of 'energy resources and energy'.[11]

Granted that this case concerned amelioration of pre-existing social problems, it still indicates that project impacts must be dealt with by mitigative measures. The public interest to which the ERCB must have regard is a narrow one, confined to conservation of energy resources. Similarly, then, while the Board is required to control pollution and conserve the environment, and, where possible, must require mitigation of environmental impacts of projects, to go further and deny a well licence solely on environmental grounds would strain the meaning of "the public interest" under this statutory mandate. Because of this limited jurisdiction, the Board also may not assume a broad supervisory role with respect to environmental management of well drilling, as it has done recently. [12]

This jurisdiction also limits the issues the Board may investigate in its hearings. For instance, the need for the well is a legitimate factor when considering the best way to develop a particular pool and to maximize the economic gain to the province. However, in a recent well licence decision, the Board listed as one of the issues it would consider the "need for protection of native prairie habitat."[13] As concluded above, the public interest requires that the Board take steps to minimize the project's impacts but does not grant it jurisdiction to investigate broad issues such as the protection or preservation of any part of the environment. This is a policy issue best left to elected representatives.

In the above discussion we have argued that the Board cannot deny a well licence application purely for environmental reasons. However, this is not the only problem faced by intervenors who wish to present environmental concerns to the Board. Section 29(2) of the ERCA grants standing in Board proceedings to any person whose 'rights' may be directly and adversely affected. The Board has interpreted 'rights' to include an economic interest but has not granted the same standing to persons claiming an environmental interest.[14] If a person with an economic interest does not seek standing, can the Board give standing to a person claiming only an environmental interest?[15] If the answer to this question is "no", as it probably is, how can the Board fulfil its assumed environmental mandate in applications for areas where no one other than the proponent has an economic interest in the surface? Finally, if an economic interest is a legal prerequisite to require the Board to hold a hearing, how can the Board claim it has a broad environmental mandate at all?

Public interest groups and landowners clearly desire input of some kind into all matters related to the drilling of a well, from the actual drillsite and access roads to reclamation of the site and the overall development plan for the area. Since the Board's hearing is the only chance for such input, these groups invite the Board to consider all these matters. Very often, the Board obliges. However, it cannot make a decision on these matters. The only decision it can make with respect to the environment is to ensure that impacts are mitigated where possible. The public interest group cannot ultimately succeed in achieving a denial of a well licence in a Board hearing. Any denial based on environmental grounds could be appealed successfully by the proponent.

Like intervenors, the proponent now faces increasing problems due to the Board's assumption of a broad supervisory role with respect to the environment. The proponent is now liable to have wide-ranging conditions imposed on its licences and may face regulation in matters of reclamation by both the ERCB and the Land Surface Conservation and Reclamation Council. Increasingly, it is required to bring evidence to the hearing on a broad range of issues.

Public interest groups face a gap left in Alberta's regulatory procedures for oil and gas development, proponents face increasing regulation by multiple statutory bodies, and the Board itself continues to operate under a very unclear environmental mandate. It is time to examine the issue of how environmental concerns should be dealt with in these developments. Whether through addition of a new independent procedure or through expansion and clarification of the ERCB's mandate with respect to the environment, legislative action is needed.

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Notes

1. The Board's changing views about its jurisdiction can be traced particularly well in the following decisions: Energy Resources Conservation Board, Decision on the *Application by Consolidated Oil and Gas (Canada) Ltd. for a Licence to Drill a Well in the Ghost Pine Area*. ERCB Decision 77-18, October 17, 1977; *Decision on the Application by Western Decalta Petroleum (1977) to Reinstate Well Licence Nos. 85532 and 85632, Rockford Area*, ERCB Decision 81-11, June 5, 1981; *Report on an Application by Shell Canada Limited to Drill a Critical Sour Well in the Jutland (Castle River South) Area*, ERCB Decision D86-2, June 3, 1986; *Shell Canada Limited Well Licence Applications, Waterton-Prairie Bluff Area*, ERCB Decision D 87-16, October 27, 1982; *Shell Canada Limited Application for a Well Licence, Waterton Field*, ERCB Decision Report D 88-16, December 22, 1988; *Bonanza Oil & Gas Ltd., Application for a Well Licence, Altario Field*, ERCB Decision D 89-3, July 14, 1989.
2. *Energy Resources Conservation Act* RSA 1980, c. E-11.
3. *Oil and Gas Conservation Act* RSA 1980, c. 0-5.

4. Energy Resources Conservation Board, *Decision on the Application by Consolidated Oil and Gas (Canada) Ltd. for a licence to Drill a Well in the Ghost Pine Area*, ERCB Decision 77-18, October 17, 1977 at p. 10. Section 14(1) of the OGCA empowers the board to refuse to issue a well licence.
5. Energy Resources Conservation Board, *Shell Canada Limited Application for a Well Licence, Waterton Field*, ERCB Decision Report D88-16, December 22, 1988, at p.11. This decision is commonly known as the Whitney Creek decision.
6. *See, Energy Resources Conservation Act, supra* note 2, s.2(c) and *Oil and Gas Conservation Act, supra* note 3, s.4(a).
7. The Board has discretion to refuse to issue a well licence application under s. 14(1) of the OGCA. Its discretion must be exercised in accordance with its statutory mandate.
8. *Athabasca Tribal Council* v. *Amoco Canada Petroleum Co. Ltd. et al.*, [1980] 22 A.R. 541 (Alta. C.A.) and [1982] 29 A.R. 350 (S.C.C.).
9. *Athabasca Tribal Council* v. *Amoco*, [1982] 29 A.R. 350 at 356.
10. *Id* at 358.
11. *Id* at 360. Section 5(b)(1) of the OGCA referred to by Ritchie, J. is now s. 4(c). Section 24(1)(b) of the ERCA is now s. 22(b).
12. For example, it has concerned itself with reclamation issues, a matter otherwise under the jurisdiction of the Minister of the Environment by the terms of the *Land Surface Conservation and Reclamation Act*, RSA 1980, c. L-3. The Board's approach to reclamation issues varies. It has on occasion stated clearly that these issues are not within its jurisdiction. However, in other instances it has heard and considered evidence about reclamation, and has very recently gone so far as to criticize standard reclamation guidelines and to require extra steps from the applicant in respect of site restoration: Energy Resources Conservation Board, *Bonanza Oil & Gas Ltd., Application for a Well Licence, Altario Field*, ERCB Decision D 89-3, July 14, 1989.
13. *Id*, at 3.
14. See (Energy Resources Conservation Board) *Exploratory Well Proposed by Shell for Jutland (Castle River South) Area*, Application No. 851037, Procedures Meeting, Memorandum of Decision, November 14, 1985. Note that though the Board did not grant 'official' standing to intervenors claiming environmental interests it allowed them to appear at the hearing. It was required to hold a hearing because of the person with the economic interest.
15. There is no jurisprudence as to whether 'rights' in this context could include an environmental interest. We believe that the Board's own approach is probably correct.

Federal Environmental Impact Assessment and the Courts

by P. S. Elder

The recent decision in *Canadian Wildlife Federation* v. *Minister of the Environment* [1] (hereafter *CWF*), holding that the federal Environmental Assessment and Review Process (EARP) Guidelines Order [2] creates binding obligations, surprised and pleased many Canadians. In *Friends of the Oldman River Society* v. *Ministers of Transport and Fisheries* [3], however, Jerome A.C.J. decided that EARP is not binding on those federal ministers. Since both cases concerned the environmental impact assessment procedure followed in provincially initiated dam projects (the Rafferty/Alameda in southeastern Saskatchewan and the Oldman in southern Alberta), we may ask how the two cases can co-exist. Although space limitations preclude detailed analysis, it will be suggested that the reasoning in both cases may be suspect.

EARP has existed as policy for more than a decade. It was intended "to ensure that the environmental impacts of federal projects, plans and activities are assessed early in their planning, before any commitments or irrevocable decisions are made.[4] But it was only in 1984 that the Guidelines Order provided a legislatively based structure for assessment across the entire federal government.

Résumé

L'auteur analyse deux causes récentes jugées par la Cour fédérale du Canada relatives aux exigences juridiques du Processus fédéral d'évaluation et d'examen en matière d'environnement. En se fondant sur divers motifs, il suggère que le raisonnement suivi dans ces deux causes est suspect. Il conclut qu'il est indispensable que le processus soit clarifié par la loi.

The Department of the Environment Act authorized the Guidelines:

> 6. For the purpose of carrying out his duties and functions related to environmental quality, the Minister [of the Environment], may, by order, establish guidelines for use by departments, boards and agencies of the Government of Canada and, where appropriate, by... regulatory bodies in the exercise of their powers...[5]

The "duties and functions" in this regard include the duty to "initiate programs designed to ensure that the *federal* projects ... are assessed..." (s.5).

Commentators, including the present writer, had thought that the Order would have a binding effect only because of Cabinet's ability to direct the public service and not because of the bite of "guidelines".[6] How wrong we were.

Two Saskatchewan dams, the Rafferty and the Alameda, are intended to provide flood control, cooling water for a large coal-fired electricity-generation project and accompanying irrigation and recreational benefits. An 1,800-page Environmental Impact Statement (EIS) was prepared by the proponent, the provincial Crown corporation Souris Basin Development Authority.[7] Although the Souris River flows into the United States and then Manitoba, the EIS did not address extra-Saskatchewan effects. In spite of this lack of information, the federal Minister of the Environment issued a licence for the project under the International Rivers Improvements Act[8] without invoking EARP. To him, the project, having been proposed by a provincial Crown corporation, funded by

Saskatchewan and located on provincial land, was a provincial, not a federal undertaking. As a result, and also because he felt EARP applies only if there is no duplication of assessment, he held that the project was beyond EARP's purview.

The Federal Court, however, quashed the licence and ordered the Minister to comply with the EARP Guidelines Order. Cullen J. first pointed out that the planned construction was clearly an international river improvement and thus needed a licence from the Minister of the Environment under the International River Improvements Act. The provincial Crown was specifically bound by that act (s. 8). Next, Cullen held almost cursorily that the *Guidelines* Order is binding law, on the grounds that regulations are binding and the definition of "regulation" in s. 2 of the Interpretation Act[9] "includes an order".

Cullen J. has no difficulty holding that the Guidelines Order applied to the project. Section 6 of the Guidelines provides that they apply to any "proposal that may have an environmental effect on an area of federal responsibility". A "proposal includes any initiative, undertaking or activity for responsibility" (s. 2). Since the project required a licence from the Minister of the Environment, clearly the initiative of building a dam was a proposal. Also because of the licensing power, although Cullen did not say this, the Department of the Environment was an "initiating department", a status prerequisite to any department's having duties under the Guidelines. Thus, it seems hard to deny that the Guidelines applied - *if* having federal regulatory aspects makes a provincially initiated project federal.[10]

The last question about the applicability of the Guidelines concerned the direction in s.5(1) that where environmental regulation independent of EARP occurs, "duplication in terms of public reviews is to be avoided". Cullen J. acknowledged this, but pointed out that some areas had not been covered by the extant assessment process and therefore that EARP should be invoked.

The Federal Court of Appeal upheld Cullen J. Hugessen, J.A. rendered brief reasons for judgment from the Bench. After comparing ss. 5 and 6 of the Department of the Environment Act and reading both the English and French (both equally authoritative) versions of the latter, he decided that s.6.

> is unquestionably capable of supporting a power to make binding subordinate legislation. The work "guidelines" in itself is neutral in this regard. Finally, there is nothing in the ... Guidelines themselves which indicates that they are not mandatory: on the contrary, the repeated use of the word "shall" throughout ... indicates a clear intention that the guidelines shall bind those to whom they are addressed, *including* the Minister of the Environment himself.

The now repealed Clean Air Act [11] is the only other Canadian statute where this writer has seen guidelines mentioned. There, the guidelines were authorized to indicate quantities and concentrations of air contaminants which "should" not be emitted. In what appears to be the only relevant case on point, the Massachusetts Court of Appeal said a guideline "implies *some* instruction for future conduct."[12]

The French term in the Order is "directives". This word may imply more binding force than "guidelines", but dictionaries offer little additional guidance on how binding the latter is. For instance, the Oxford Dictionary gives no relevant definition. Funk and Wagnall's *Standard College Dictionary* (1976) avoids the issue: a guideline is "any suggestion, rule, etc., that guides, directs, or sets a standard".

Since the term "guidelines", rare from a legislative point of view, was used by the legislature instead of the more straightforward "regulation", one has to assume that there was a reason. The word is not unequivocally mandatory. It is speculated that the drafters wanted to make EARP look as robust as possible, even though it would not be binding when push came to shove - hence "guidelines" which provide that people "shall" do something. It will be noted that Hugessen J.A. used the language of the order itself to buttress his conclusion that it was binding. This cannot, however, be determinative, as it begs a question implicitly in issue- whether Parliament meant guidelines to bind.

In any event, Jerome A.C.J. in *Oldman* was bound to accept at least a narrow interpretation of the *CWF* case: that the Guidelines Order is binding and that the Minister of the Environment there had to comply with EARP before issuing licences, even for provincially initiated projects which have undergone some environmental assessment. Implicitly, Rafferty/Alameda had become a "federal project". Jerome A.C.J., to avoid enforcing the Guidelines, had to distinguish *CWF*, but in doing so he made some mistakes.

The Oldman dam is being built as a water storage and management facility in a region subject to drought. The planning of the facility included extensive public involvement, including a major set of public hearings before the present Three Rivers site was chosen. Unlike *CWF*, however, there were no obvious gaps in the voluminous environmental assessments prepared for the province. Further, a committee of the federal Department of the Environment had reviewed the proposal and officials of the Department of Fisheries had been working with provincial counterparts to address fishery concerns.

Between the time of the provincial application to the federal Minister of Transport for approval of the dam under the Navigable Waters Protection Act[13] (NWPA) and his approval in August 1987, the federal and provincial governments entered into an agreement concerning EIA of projects in Alberta. The Province was to apply its procedures when primarily provincial projects were involved, but undertook to address the interests of Canada. The defendants in the case claimed

that this process had worked satisfactorily and that EARP would add nothing new.

The applicant Society, numbering some 500 members, asked for an order quashing the Minister of Transport's licence, a declaration that environmental effects on fisheries were involved and that the Department of Fisheries was an initiating department under the Guidelines. It also sought *mandamus* against both ministers to force compliance with the Guidelines.

Jerome A.C.J. rejected all the applicant's claims for relief.[14] Although his conclusion may be right if the Court of Appeal erred in *CWF*, either by making guidelines binding, or in deciding that this type of project is federal - in which case only the Supreme Court could set matters right - his explicit arguments were unconvincing.

First, he distinguished *CWF*. Unlike the Minister of Environment in that case, the Ministers of Transport and Fisheries lack any environmental mandate under the relevant legislation. Therefore, nothing could be done with any environmental study and the Guidelines do not apply. If Jerome A.C.J. is right, being "the decision making authority for a proposal" (the Guidelines definition of "initiating department) - with "an environmental effect on an area of federal responsibility" (which the project clearly has) is not enough to make the Guidelines apply. *CWF* gets a new wrinkle - a department needs to be an *environmental* decision maker before the Guidelines apply. For Jerome A.C.J., it would have been *ultra vires* for the ministers to have invoked the Guidelines.

However, the Guidelines use the environmental effects, not to impose an environmental mandate on the regulating department, but to "order" that the project be *referred to the Minister of the Environment for public review by a panel*. The lack of clarity about what happens after the review is certainly a weakness in the Guidelines, but surely Jerome A.C.J. was not entitled to ignore the conclusion by Hugessen J. A. that the Guidelines "shall bind *all those to whom they are addressed, including* the Minister of the Environment himself" (emphasis supplied). For Hugessen J.A. the Guidelines Order was a law of general application, intended to bind all agencies, not just the Department of the Environment.

Another questionable holding of Jerome A.C.J. is that the NWPA authorizes the Minister of Transport to approve a project during or after construction, and is therefore inconsistent with the intent of the Guidelines Order, which contemplates review before irrevocable decisions. This is a misreading of the NWPA S. 5 of that Act prohibits a work from being

> built across any navigable water unless (a) the work and the site and plans ... have been approved by the Minister ... *prior to commencement of construction* [emphasis supplied].

S. 6 (4), upon which Jerome depends, merely allows the Minister retroactively to approve illegally built works instead of ordering them removed.

In any case, judges are supposed to decide the case before them, not hypothetical ones. Here the Province had applied for a permit 5 months before the contract for building the dam was awarded. It follows that the Department of Transport became a decision-making authority in time and was thus subject to the Guidelines.

As for the Minister of Fisheries, Jerome A.C.J. held that he "cannot be required to undertake an environmental review because his department has not undertaken a project." Of course this is not what defines an initiating department and ignores the contrary holding in *CWF*. What His Lordship must have meant is that the Department is not an initiator because the Fisheries Act does not contemplate any licence or permit procedure - i.e., the Department has no decision-making authority. But it is strongly arguable that the Minister is a "decision making authority" because of s. 37 of the Act, and therefore that Fisheries is an initiating department and subject to the Guidelines. Section 37 provides:

> (1) Where a person proposes to carry on work ... likely to result in the ... disruption of fish habitat, the person shall, on the request of the Minister ..., provide the Minister with such plans as will enable the Minister to determine whether ... [this is the case].
>
> (2) If ... the Minister ... is of the opinion that an offence under subsection 40(1) or (2) ... is likely to be committed, the Minister may ...
>
> (a) require ... modifications ... to the work ..., or
>
> (b) direct the closing of the work ... for such periods as the Minister ... considers necessary ...[The offences referred to are disruption of fish habitat and the deposit of a deleterious substance into water inhabited by fish.]

Such a review had been carried out by Environment and/or Fisheries,[15] which established a decision to apply s. 37, and thus created a federal initiating department.

Jerome A.C.J.'s arguments, then, can be challenged. It is easy to see, however, why he would have exercised his discretion against the prerogative relief sought even if he had felt the Guidelines applied. EARP's object is to ensure environmental assessment, while avoiding duplication of effort among bodies with different jurisdictions. Apparently, federal concerns had been addressed and federal officials had been involved and were satisfied with the measures. There had also been a public review in 1978, although the provincial panel did recommend against the ultimate site. Further, a legislatively authorized " federal provincial agreement had been signed and Jerome A.J.C. thought everything necessary had been done, even if not by federal officials in charge of EARP. Unfortunately, His Lordship did not analyze the legal implications of the agreement (which expired on May 15, 1989) and the delegation; his decision *might* have been more convincing on this ground.

In conclusion, there is lingering doubt about the binding nature of guidelines, and perhaps whether either project was a federal one. But the Federal Court of Appeal has decided both these questions

in the affirmative. Therefore, the Friends of the Oldman Society might have succeeded on appeal to that court, in spite of the misgiving of Jerome A.C.J. that there is no point in environmental assessment if no regulatory agency has the power to consider environmental factors. Lastly, the confusion exposed in the cases shows the need for a comprehensive federal Environmental Assessment Act. The long-promised statute is awaited with interest.

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Notes

1. Fed. Ct. Trial Div. (Cullen J.) Ct. No. T-80-89, aff'd by Fed. C.A. No. A-228-89 (June 22, 1989).
2. S.O.R./ 84-467, now authorized under s. 6 of the Department of the Environment Act R.S.C. 1985 c. E-10.
3. [1989] F.C.J. No. 904, Action No. T-865-89 (Oct. 4, 1989).
4. Federal Environmental Assessment Review Office, *Revised Guide to the Federal Environmental Assessment Review Process* (1979) at 1.
5. Department of the Environment Act *supra* note 2 (words in brackets supplied).
6. P.S. Elder, "The Federal Environmental Assessment and Review Guidelines Order" *Resources* No. 13 (1985).
7. This background information on the project comes from Robin Karpan and Arlene Karpan, "The Rafferty/Alameda Controversy" *Probe Post* 11:3 (Fall, 1988) 12.
8. R.S.C. 1985 c. I-20.
9. R.S.C. 1985 c. I-21.
10. Another ground for federal involvement, the judge said, was that federally-owned lands (or lands held in trust and managed by the federal government) were affected. But s. 6(d) of the Guidelines brings the project under EARP if the project was "located" in such lands. Affecting the lands does not count.
11. R.S.C. 1985 c. C-32 s.9.
12. *Board of Education* v. *School Committee of Amesbury*, 452 NE 2d 302 at 306.
13. R.S.C. 1985 c. N-22.
14. One of the remedies sought against the Minister of Fisheries was a declaration, which can be awarded only after a trial. Jerome was unwilling to find that Ministry to be an initiating department without a trial, but went on to argue that it was not.
15. The Minister of the Environment's Office has acknowledged *Environment Canada's* responsibility for the pollution sections of the Fisheries Act. If the Environment Protection Service (EPS) also has power to conduct a s. 37 assessment, it is faintly arguable that Environment Canada is in the same position here as in *CWF*, although more likely EPS is for this purpose an extension of Fisheries.
16. Department of the Environment Act *supra* note 2 s. 7.

Lac Minerals Ltd v International Corona Resources Ltd: Confidential Geological Information in the Supreme Court of Canada

by Barry Barton

The struggle for ownership of the Page-Williams Mine in Northern Ontario ended on 11 August 1989 with the decision of the Supreme Court of Canada. After winning at trial (1986) 53 O.R.(2d) 737 (Ont H.C.J.), on appeal (1987) 62 O.R.(2d) 1, and on a motion to have judgment set aside, International Corona Resources Corporation (now Corona Corporation) won the final round of its suit against Lac Minerals Ltd. The case is of enormous importance for mining industry practices in the handling of confidential information in site visits and negotiations toward the joint development of property. In previous comments in Resources (Nos. 15 and 20) I discussed the earlier decisions. The decision of the Supreme Court is noteworthy for the vigorous disagreements that occurred on two fast-changing fields of law, breach of confidence and fiduciary duty.

The Facts and the Decisions Below

A striking feature of the case is that Lac and Corona never brought their negotiations to the point of a contractual relationship. Because of this, the details of the meetings, discussions and correspondence between them became crucial. To summarize the facts as found by the trial judge, Corona was the owner of a group of mining claims, and was carrying out an exploration program on them. Being a junior company, it was keen to attract the interest of investors, and had publicized a

Résumé

L'auteur analyse la décision rendue le 11 août 1989 par la Cour suprême du Canada dans la cause Lac Minerals Ltd c International Corona Resources Ltd. Cette affaire est d'une importante considérable pour l'industrie minière eu égard au traitement de renseignements confidentiels obtenus lors de visites sur les lieux et de négociations en vue du développement conjoint d'une propriété. Corona était propriétaire d'un groupe de concessions minières, sur lesquelles elle avait un programme d'exploration. Désireuse d'attirer des investisseurs, Corona publia certains renseignements qui suscitèrent l'intérêt de Lac Minerals. Suivirent des visites sur les lieux et des rencontres au cours desquelles Corona mentionna qu'elle essayait d'acquérir une propriété voisine, appartenant à un dénommé Williams, dans laquelle la zone minéralisée continuait. À l'insu de Corona, Lac Minerals acheta en l'espace de quelques jours la propriété Williams qui s'avèra être la plus grosse mine d'or du Canada. La Cour suprême a confirmé le jugement de la Cour d'appel de l'Ontario, mais en se fondant sur des motifs quelque peu différents des tribunaux inférieurs: la Cour a été unanime à juger Lac Minerals responsable pour raison d'abus de confiance, mais une majorité de juges a estimé qu'une obligation fiduciaire n'avait pas été établie dans ce cas. La majorité de la Cour jugea que le dédommagement approprié devait être une fiducie induite des faits pour rectifier l'enrichissement sans cause, plutôt que des dommages-intérêts.

certain amount of information about the property. It attracted the interest of Lac Minerals, a major mining corporation, and a site visit was arranged with a view to making some kind of joint arrangement. The Lac geologists were shown core samples, sections and logs with assay results added. They discussed the geology with Corona's geologist, and learned that the mineralized zone continued to the west on the adjoining property, the Williams property. A second meeting took place two days later in Toronto, and it was mentioned that Corona had someone trying to acquire the Williams property. No mention was made of confidentiality.

Further discussions and an exchange of joint venture ideas followed. Corona made a full presentation of its results to date, and again made mention of its efforts to acquire the Williams property. The judge found that Corona's purpose in coming to these meetings was to make a deal.

Immediately after the site visit, however, there was a "frenzy of activity" on the part of Lac as it gathered information about the geology and ownership of the area. It located the owner of the Williams property and, three days after hearing Corona's full presentation, made an offer to her. The owner compared it with the offer that Corona had been negotiating, and accepted it. Only then did Corona learn that it was Lac who had made the competing bid. Corona asked Lac to return the property to it, and commenced proceedings, but Lac proceeded on its own to develop what turned out to be the biggest gold mine in Canada.

The trial court found that Lac had been in breach of a duty of confidence to Corona, by reason of its misuse of confidential information supplied to it in circumstances which imposed an obligation of confidence; and also that Lac was in breach of the fiduciary duty that Lac and Corona owed each other not to act to each other's detriment on account of their relationship as prospective joint venturers. The proper remedy was to return the mine, subject to a payment for the development costs. The Ontario Court of Appeal upheld the judgment, but relied primarily on fiduciary duty as the source of liability.

On the eve of the Supreme Court of Canada hearing, Lac moved for a new trial on the grounds that critical evidence at the trial relating to Corona's efforts to acquire the property was obtained by fraud arising from perjured or intentionally misleading testimony. The court decided that the motion was utterly groundless, but not before hearing extraordinary evidence about "corporate paranoia" in the conduct of Lac's litigation, including private investigators, anonymous letters to the police and even an investigation of the trial judge and his daughter.

The Supreme Court affirmed the trial judgment but on somewhat different grounds from the lower courts. Lengthy judgments were delivered by Sopinka J. (with whom McIntyre agreed) and by La Forest J. Wilson and Lamer JJ. each delivered a short judgment, that of Wilson J. being in substantial agreement with La Forest J. Liability on the grounds of breach of confidence was unanimously agreed upon. The proper remedy was held by a majority (La Forest, Lamer and Wilson JJ.) to be a constructive trust to rectify an unjust enrichment, rather than damages. A different majority (Lamer, McIntyre and Sopinka JJ.) held that the facts did not disclose any fiduciary duty on Lac. It is convenient to take each of these elements separately.

Breach of Confidence

With the amount of debate on the issues of fiduciary duty and remedies, it is easy to lose sight of the fact that Lac was found liable for a breach of a duty of confidence The significance of this is that the Supreme Court has not relied explicitly on this rapidly-developing head of liability before. The Court's unequivocal endorsement should encourage greater use of it, especially where there are difficulties in establishing a contractual or fiduciary duty. Breach of confidence is usually considered to originate primarily, but not exclusively, in the equitable jurisdiction of the courts; see Gurry, *Breach of Confidence*, Oxford University Press, 1984. (But note that Wilson J. briefly refers to Lac's conduct as a "breach of confidence at common law".)

The Court confirmed the three elements that must be established to impose liability:
(i) that the information conveyed was confidential;
(ii) that it was communicated in circumstances in which a duty of confidence arises; and
(iii) that it was misused by the party to whom it was communicated.

There was little difficulty in applying the first two elements to Lac and Corona. Certainly, some of the information that Lac relied on was not confidential but it was clear that the site visit and discussions with Corona gave Lac information that was a "springboard" that led it to the acquisition of the Williams property. The question of how the circumstances imposed a duty delayed the Court little more than it did the trial court; the information was transmitted with the mutual understanding that the parties were working towards a joint venture or some other business arrangement. A "reasonable man" test was applied, following *Coco v A.N. Clark (Engineers) Ltd* [1969] RPC 41: whether a reasonable man standing in the shoes of the recipient would have realized that the information was being given to him in confidence. The third element, to the detriment of the plaintiffs, was also satisfied.

Fiduciary Duty

On the existence of a relationship between Lac and Corona, the divisions on the Court began to open up. Sopinka J. for the majority took a restrictive view of fiduciary obligation, describing it as "equity's blunt tool", rarely if ever needed in arm's-length dealings. He referred to a number of sources on what features the courts will look for in order to describe a relationship as a fiduciary one. He concluded that the indispensable feature is the vulnerability or dependency of the beneficiary on the fiduciary. Corona was not vulnerable here or, to the extent that it was, it had gratuitously incurred the vulnerability. It could have protected itself with a confidentiality agreement before showing its information to Lac. Nor was it possible to find that the duty arose out of the disclosure itself, or out of the relationship of parties negotiating seriously toward a common goal, or from industry practice.

In the minority, La Forest J. carried out a wide-ranging examination of the basic principles of fiduciary duty. He concluded that vulnerability, so indispensable to the majority, was not an infallible touchstone for the discovery of a fiduciary relationship. Certainly, it was frequently found and was often a factor that supported the imposition of liability, but it was not a sine qua non. Even as seminal a case as *Keech v Sanford* (1726) Sel. Cas. T. King 61, 25 E.R. 223 was an example of liability to a beneficiary who was not vulnerable to, and did not suffer harm from, the fiduciary's exercise of his powers. Moreover Corona *was* vulnerable; its failure to extract contractual obligations from Lac did not excuse Lac's conduct, any more than it would excuse a tort committed by Lac. (Wilson J., in her brief comments, agreed that the duty arose when Corona made the information available and made itself vulnerable to Lac.) There were other factors that supported the imposition of a fiduciary duty. One was the trust and co-operation that permeated the relationship, including the disclosure of information in negotiations in good faith. The other was industry practice. Experts in mining practice could not give evidence of the existence of fiduciary duties, but their evidence of a practice in the industry not to act to the other's detriment during serious negotiations of this type was very weighty in determining the reasonable expectations of Corona. Nor, he concluded, could fiduciary duty be excluded from commercial relations on the grounds that it introduced ad hoc moral judgements into commercial law: "It is simply not the case that business and accepted morality are mutually exclusive domains."

The Remedy

The majority (*per* La Forest J.) took as fundamental the fact that but for Lac's misuse of confidential information Corona would have acquired the Williams property. There were policy and social rationales for a remedy measured by Lac's gain rather than merely by Corona's loss. Bargaining in good faith and the protection of confidences were institutions that needed to be protected. The modern approach (as expounded by *Pettkus v Becker* [1980] 2 S.C.R. 834 and *Hunter Engineering Co* v *Syncrude Canada Ltd* [1989] 1 S.C.R.426) is to ascertain whether an unjust enrichment had occurred (which it certainly had here) and then to ask whether a constructive trust is an appropriate remedy in the circumstances. It was. "Where it could be more appropriate than in the present case, however, it is difficult to imagine." (*per* La Forest J.) Among the circumstances were the uniqueness of the Williams property, the fact that but for Lac's breaches Corona would have acquired it, and the virtual impossibility of valuing the property.

In the minority, Sopinka J. proposed a limited role for constructive trust, reserving it ordinarily for situations where a right of property is recognized, apparently meaning here a right of property in information. He found virtually no support in the cases for a constructive trust for the misuse of confidential information; rather, in breach of confidence the focus is to be on the loss to the plaintiff. He also emphasized his view that the trial judge had not actually found that Lac had acquired the property as a result of the confidential information. Damages were therefore the proper remedy, and they were to be measured by the loss to Corona. This required one to take into account the fact that Corona would have had to enter into a joint venture of some kind, probably on a 50-50 basis; and but for Lac's breach the joint venture would probably have been with Lac. Damages should therefore be half the value of the mine, assessed on a discounted cash-flow basis as at January 1, 1986, with allowance for the development costs.

The Significance of the Decision

As I suggested at the outset, the primary significance of the case in terms of legal issues is the unequivocal recognition of breach of confidence, with its three constituent elements, as a cause of action. The Supreme Court has dealt with similar confidential information before (*Pre-Cam Exploration & Development Ltd v McTavish* [1966] S.C.R. 551), but without this conceptual framework. Constructive trust is demonstrated to be a fitting remedy where the breach results in an unjust enrichment. The restrictive views of Sopinka J. on remedies, and his proposition that in breach of confidence the focus is on the loss to the plaintiff, are rebutted.

Divergent though the views on fiduciary duty may be, they both show an effort to fix on the general principles that govern fiduciary liability. In recent years, especially since *Canadian Aero Service Ltd v O'Malley* [1974] S.C.R. 592, the emphasis has been on the flexibility of the concept, but the Court in this case seems to be looking for principles that will indicate whether a relationship can be called a fiduciary one. The majority's proposition that the essential ingredient is vulnerability, coupled with the vigorous dissent, will fuel further debate. There was unanimity, it should be noted, in rejecting two propositions that may have been implicit in the decisions of the courts below: that the relationship of "serious negotiations" is inherently fiduciary, and that expert evidence of industry custom can in itself establish a fiduciary duty. The latter in particular was troublesome in leaving no place for the courts in deciding whether legal liability attaches.

The majority's notion of self-inflicted or gratuitously incurred vulnerability will undoubtedly be troublesome if it is regarded as an accurate statement of the law. As La Forest J. points out, there is no such defence in tort law. Indeed, in the law of fiduciary obligation itself, it would excuse a breach in the many cases where the relationship is at least in part consensual - principal and agent, solicitor and client, partner and partner. The whole point of fiduciary duty, surely, is that in certain circumstances you are entitled to rely on a person without having to obtain his or her agreement not to hurt you. And in practical terms, as La Forest J. again points out, it should not be necessary "to clutter normal business practice by requiring a contract" to reduce vulnerability. This part of Sopinka J.'s judgment can be treated as *obiter* or as peculiar to the facts of the case, and it is to be hoped that future courts will do so.

One other point of Sopinka J.'s judgment that calls for comment is his view of certain critical facts. He decided that there was no finding by the trial judge that Lac acquired the property as a result of the confidential information received from Corona, and no finding that the mutual understanding of the parties prevented Lac from acquiring the property for the joint account. From this he came to the conclusion that Corona could have only acquired at most 50% of the property, and would have awarded damages accordingly. With respect, this seems to be precisely what Sopinka J. himself warns against - extending the trial judge's findings of fact without any proper basis. It is by no means obvious that the trial judge left these matters open. Certainly he could not have given the judgment that he did if he had seen the facts Sopinka J.'s way. There is no matter of mixed law and fact or inference from facts of the kind that an appellate court usually looks for in order to disturb a trial judge's view of the evidence. In any event the inadequacy of the damages is manifest. Corona intended to come to the negotiations with Lac as the owner of a 100% interest in the Williams property, and would have, but for Lac's breach. That is the position to which damages should have restored Corona.

It is rare that a legal decision generates as much interest among non-lawyers in the resource industries as this one did. The shock wave that this case sent out may have been caused by the exceptionally large sums of money involved, but in my opinion the main reason was that many people could identify with the situation in which the parties found themselves. The facts were not complicated and the question of business ethics was plain to see. This is fortunate, because to the industry the decision stands as a reaffirmation of the severe penalties that the courts can impose for sharp dealing on occasions where it should be obvious, to anyone aware of industry expectations, that a higher standard of conduct is required.

Contract Law for Oil and Gas Personnel

The Institute offers a two-day course on contract law designed for non-lawyers who deal extensively with contracts. The course examines such issues as how a contract is formed and terminated, judicial approaches to the interpretation of contracts, and the calculation of damages. In addition, a number of clauses commonly found in petroleum industry contracts are scrutinized (including *force majeur*, and confidential information).

Materials prepared for the course draw upon Canadian cases and problems involving the petroleum industry. The course is conducted by Professor Nicholas Rafferty of The University of Calgary Law School, and Barry Barton, Research Associate of the Institute. The course may be offered publicly, or in-house to oil company employees. The next public course will be held February 22 and 23, 1990 at the Stampeder Inn.

For more information about the contract law course please contact Pat Albrecht at (403) 220-3200.

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Martha Roggenkamp, International Instituut voor Energierecht, Universiteit Leiden, Leiden, The Netherlands.

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New Publication

The Inuvialuit Final Agreement, by Janet Keeping.1989.
ISBN 0-919269-28-1 150 pages.
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In June 1984 The Inuvialuit of the Mackenzie Delta/Beaufort Sea region signed a land claims agreement with the federal government. Under the terms of the Inuvialuit Final Agreement, the Inuvialuit gave up their claim to aboriginal title to vast stretches of the Canadian north in exchange for financial compensation and a variety of other rights.

This study has as its primary focus the impact of the Inuvialuit Final Agreement on oil and gas activities north of the 60th parallel. It includes a description of the provisions of the Agreement most relevant to the oil and gas industry, a second section on the Agreement (such as its constitutional status) and a third which examines a series of issues relating to oil and gas operations to which the Agreement has given rise.

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Institute News

1989 Essay Prize Awarded

The Institute recently awarded its annual $1,000 essay prize to Mr. Terry Davis for his paper entitled "Successor Liability for Environmental Damage". The Instiitute has published the paper.

Mr. Davis graduated from the University of Alberta with an Honors B.A. in Political Science in 1969 and an M.A. in Political Science in 1968. He was awarded a Commonwealth Scholarship in 1968 to do graduate research at the University of Manchester in England and was awarded a Canada Council Grant in 1970. He was a visiting professor in Politics at the University of Iceland, and a lecturer (assistant professor) in Political Theory and Philosophy at Loughborough University in England. In 1986 he was awarded the University of Calgary E.W. Costello Scholarship in Law. While at the University of Calgary, he was a co-recipient of the John Romanow Prize in Administrative Process. He received his LL.B. in 1989. He is currently articling in Calgary with the law firm of Parlee McLaws.

Mr. Davis' paper was one of thirteen essays submitted to a Selection Committee composed of Hugh Gaudet of Chevron Canada Resources Limited (Chairman); Judy Snider, a lawyer with the firm Code Hunter; and Professor Ian Rounthwaite of The University of Calgary Faculty of Law. Of the thirteen papers submitted, five were submitted by University of Calgary students, two by University of Alberta students, two by University of Victoria students, three by University of Saskatchewan students, and one Queen's University student.

Students wishing to submit an entry for the 1990 Essay Prize should contact their Dean of Law for an application form.

New Research Associate

Monique Ross recently joined the Institute as a Research Associate. She was previously employed by the Institute as a contract researcher and a translator. She holds a Bachelor of Law degree from the University of Montreal and a Master's in Urban and Regional Planning from The University of Calgary.

Ms. Ross's past research has included studies on Quebec's policy and regulatory instruments with respect to water exports and preparation of a Canada Enviromental Advisory Council report assessing the *Canadian Enviromental Protection Act*. She will carry out research on the Legal Issues in Canadian Forest Management.

Legal Issues in Canadian Forest Management

In March 1989 the Institute prepared a framework for research on "Legal Issues in Canadian Forest Management" for Forestry Canada. The department recently approved funding for the first phase of this project.

The complete project involves the preparation of two separate, though related, papers. One paper deals with the legal regime for Canada's forests and its implications for effective resource management. The other paper explores, from a legal perspective, the implications for the forest sector of the regime for environmental protection in Canada.

Resources
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Resources is the newsletter of the Canadian Institute of Resources Law. Published quarterly, the newsletter's purpose is to provide timely comments on current resources law issues and to give information about Institute publications and programs. The opinions presented are those of the authors and do not necessarily reflect the views of the Institute. Resources is mailed free of charge to more than 6,000 subscribers throughout the world. (International Standard Serial Number 0714-5918) *Editor*: Nancy Money

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