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Saunders, J. Owen; Townsend Gault, Ian

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The National Energy Program and the Pursuit of Claims under International Law

by J. Owen Saunders and Ian Townsend Gault

The National Energy Program has generated controversy in a number of areas, particularly in the approach it takes towards foreign controlled oil companies. Probably the most hotly debated feature of the Program in this respect is the provision in section 27 of the *Canada Oil and Gas Act* - a central plank in the legislative enactment of the Program - providing for a reservation to the Crown of a 25% share in existing and future interests in oil and gas licences on Canada Lands (that is, the Yukon and Northwest Territories and the offshore).

While this provision applies to interests held by all companies - whether Canadian or foreign controlled - the effects will be felt most strongly among foreign controlled firms, since they presently hold by far the largest stake in exploration and development on Canada Lands. In the result, the 'back-in' provision allows for a substantial increase in Canadian participation (and specifically, of state participation) in the development of frontier petroleum and gas reserves.

Section 27 has given rise to some debate over the question of whether appropriate compensation has been provided in the Act to firms currently engaged in frontier oil and gas activity. Of equal interest though is the question of whether the Canadian government is bound by law to provide any compensation for expropriation of these interests. Under Canadian law the answer seems settled - no compensation for expropriated interests is constitutionally required. So long as an uncompensated taking is authorized clearly and unambiguously by the relevant legislation, the expropriation will be held to be valid.

But a further question has been raised as to whether such expropriation is valid under standards of *international law* - that is, whether the compensation provided meets the norms established by the international community in such situations. This involves a consideration of whether the generally accepted standard (and certainly the standard accepted by Canada in the past) of "prompt, adequate and effective" compensation has been met. However, rather than addressing this question here, we think it may be useful to discuss what is really an antecedent point - whether in fact the back-in provisions raise a claim that can be espoused at international law at all. That is, even assuming that a level of compensation is not effective to meet some minimum international norm, whether such a norm is even relevant to the case at hand. Is there in fact any foreign state which is entitled to pursue a claim against Canada on behalf of a company which may have suffered under the Program?

For example, several Canadian subsidiaries of United States multinational oil companies are affected by the back-in provisions. It has been argued that, although incorporated as Canadian companies, these corporations are American controlled, and that American interests will ultimately suffer from any confiscation. Thus, the American government should be entitled to "protect" these companies as it would protect United States nationals - by pressing an international claim against Canada, based on international legal norms.

This argument is, however, confronted with certain difficulties, especially in light of the leading International Court of Justice decision in the area - the *Barcelona Traction* case. There, a company was established to provide electricity for Barcelona. The company was established under Canadian law, and held regular board meetings in this country for over fifty years. It created subsidiaries in Canada and Spain to carry out its activities. Over the years, Belgian interests became heavily involved in the company, interests which Belgium subsequently alleged to hold a majority shareholding in it.

As a result of bankruptcy proceedings in Spain, Canada and other governments made representations to Spain but failed to reach a settlement. Belgium then took the dispute to the International Court of Justice on behalf of the Belgian shareholders, who had allegedly suffered from certain acts by Spanish authorities. As a preliminary point, the Court was asked to rule, in effect, whether Canada or Belgium was entitled to offer the company diplomatic protection. The Court ruled in favour of Canada - the links with that country were sufficiently strong to displace the question of protection from another

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

state.

Application of the case to the present situation in Canada would suggest that oil companies incorporated in Canada should not be entitled to take advantage of United States (or other foreign) protection at international law. Admittedly, it has been suggested that *Barcelona Traction* may not extend to those cases where - as here - the company is incorporated in the state responsible for the offending acts. International legal writers are divided on this question, but the policy underlying *Barcelona Traction* would seem to suggest that a corporation should not be entitled to assume the mantle of nationality to obtain certain advantages and then have it lifted at its convenience to invoke diplomatic protection. This is especially true when we consider the particular case of oil and gas development.

Most jurisdictions permit nationals and foreigners alike to undertake preliminary exploration for oil and gas under licences of one to three years duration. Such rights are rarely exclusive, and drilling, except in connection with seismic or other similar tests, is usually prohibited. Similarly, few jurisdictions will consider granting an exclusive exploration permit or a production licence to private or corporate persons who are not nationals. A foreign corporation is, therefore, typically required to establish a subsidiary in the state and under the laws of the state. The subsidiary must have a substantial infrastructure - an established place of business, and corporate offices. The officers of the subsidiary are responsible for the way in which its licence obligations are performed, and failure to abide by terms and conditions of the licence, or the general legal regime applicable, may involve the subsidiary and its officers in civil and/or criminal liability.

The rationale for this requirement is simple. When the United Kingdom and Norway, for example, established their licencing regimes for the offshore they made it clear that they considered local incorporation essential to ensure full control of the activities of the licensee, many of whom would be the multinational oil majors. This concern was heightened by an awareness of the jurisdictional problems inherent in regulating activities on the continental shelf, outside the normal limits of state control. It was thought that creation of this link between foreign companies and the host state would ensure that domestic fiscal legislation would be applicable to oil and gas production, and that all corporate activities would be subject to civil or criminal investigation and litigation. The state would also be able to enforce directions concerning, for example, production rates, disposition of petroleum, and delivery at set prices, especially in an emergency.

The local incorporation requirement is the norm in most Middle East countries, the North Sea, and the United States. It has been a feature of Canadian legislation since the Canada Oil and Gas Lands Regulations of 1961. Local incorporation is evidence of the increasing need felt by most countries to further state control of the activities of the oil industry. Indeed, it is to a great extent the *sine qua non* of the control, and as such will be applied in most major petroleum producing jurisdictions. Certainly the Canadian policy in this respect was designed to assure, among other things, total control by the Canadian government over all actors involved, without the possibility of intrusion by foreign jurisdictions.

Given this background it seems reasonable to suggest that foreign-controlled oil and gas companies that have incorporated Canadian subsidiaries in order to exploit energy resources must be taken to have accepted fully the jurisdiction of Canadian authorities - in the same way that Canadian-controlled companies have accepted it. It is not appropriate that these companies should be able to claim the advantages accruing to Canadian incorporation and then invoke the protection of another state (protection to which Canadian-controlled corporations do not have access) when Canadian policy displeases them.

The Pitjantjatjara Land Rights Act, 1981: the settlement of aboriginal claims in the State of South Australia

The Government of Canada is currently conducting comprehensive aboriginal claims negotiations in several parts of Canada, notably British Columbia, the Territories and Labrador. Thus, the settlement of an aboriginal claim in another common law jurisdiction invites investigation. The following note presents a brief outline of some of the more important features of the Pitjantjatjara Land Rights Act (S.A. No.20 of 1981).

The Act represents the second major settlement of aboriginal land claims in Australia in the last decade (the first being the Aboriginal Land Rights [Northern Territory] Act, 1976). Although differing in detail, the legislation follows the general model of the Northern Territory Settlement rather than the James Bay Settlement in Canada, or the Alaskan Settlement in the United States.

The 3000 aborigines of the Pitjantjatjara tribe have traditionally occupied an area in the northwest part of the State. The Act provides for the transfer of over 100,000 sq. km. in fee simple to the aborigines, excluding mineral title. The Act does not provide for the transfer of further aboriginal lands as a result of a judicial inquiry process such as was established for the Northern Territory. Admittedly the land is of poor agricultural potential but the size of settlement is remarkable, not only in absolute terms, but also as a proportion of the State and as a proportion of the group's traditional territory. The contrast with the James Bay Settlement or the proposed Inuvialuit settlement in the Western Arctic is startling. In both Canadian cases the area of land under discussion is far smaller.

Existing third party interests did not present a major problem because most of the land to be transferred was formerly part of an aboriginal reserve. However, title will not be transferred to the aborigines until existing interests have been surrendered. One exception is an area of subsisting pastoral leases in which the aborigines are effectively granted the head lease and the crown subleases to existing lessees for the remainder of the term, at which time compensation is payable to the lessee for improvements and the lost opportunity to renew.

Mineral exploration on the lands is dealt with in two ways. First, free access to the Mintabie Opal Field (in the southeast of the lands) is granted to licensed precious stone miners, dependents and associated businesses. Difficulties resulting from this free access are to be resolved by the "Mintabie Consultative Committee". Second, applications to carry out any other form of mineral (including petroleum) activity are to be filed with the Pitjantjatjara before a mineral tenement is applied for. The Pitjantjatjara may grant their consent to proposed operations subject to conditions. In the event that consent is not forthcoming, or the applicant considers the terms unreasonable, reference may be had to an arbitration procedure.

The arbitration procedure is not designed simply to calculate compensation (hence, there is no *right* to mine at this stage) but also to consider, in accordance with specified criteria, whether or not mining should be permitted at all. In consequence, the arbitration system differs from the typcal surface rights arbitration which seems to be envisaged for the Inuvialuit Settlement in Canada. Any payments to the Pitjantjatjara for the mining operations must fall within those heads of compensation specified in the Act. One third of the crown royalty is payable to the Pitjantjatjara up to an annual ceiling, which is not defined by the Act but subject to ministerial discretion. No royalty is payable for precious stones.

In the result, with the major exceptions of existing third party interests, precious stone mining, and permitted mining projects, the general rule is that access to the lands is prohibited without the consent of the Pitjantjatjara. A criminal sanction is provided to this end.

Two existing roads are given special treatment by the Act. Free public access is guaranteed to these roads and to a 100 metre corridor on either side. The construction of other roads is subject to the same consent and arbitration procedure as mining. It is not clear how access would be dealt with in the event that another road were built.

The aboriginal land base is protected by two specific measures - an exemption from land tax (question whether this would apply to improvements), and a provision specifying that, except as provided in the Act, the land may not "be compulsorily acquired, resumed or forfeited under the law of the State". The aborigines themselves have fairly limited powers of disposition.

The above are some of the more important provisions of the Act dealing with classic problems faced by any land settlement. Several other issues could be considered, such as the lack of aboriginal involvement in political and environmental review structures, or the unusual provision for dispute settlement in Part IV of the Act.

N.D. Bankes

New Executive Director

Rowland J. Harrison, founding Executive Director, departed the Institute at the end of 1981 to join the federal government as Director General, Land Management, Canada Oil and Gas Lands Administration.

Professor Alastair R. Lucas, formerly Associate Executive Director and holder of the Chair of Natural Resources Law in the Faculty of Law at The University of Calgary, has been appointed Executive Director.

Professor Lucas was a member of the Faculty of Law at the University of British Columbia from 1968 to 1976, when he joined the Faculty of Law at The University of Calgary. He is currently a faculty member of the Banff Centre School of Environment and continues to hold a professorial appointment in the Faculty of Law at The University of Calgary.

Professor Lucas brings a diversity of experience to the Institute. He has served as a policy advisor and consultant to several government departments, Law Reform Commissions, and the Science Council of Canada. He is currently Chairman of the Canadian Arctic Resources Committee, founding member and first National Chairman of the Environmental Law Section of the Canadian Bar Association, a member of the Canadian Environmental Advisory Council and a representative on the Environment Council of Alberta's Public Advisory Committee. He has published extensively in the field of environmental, energy and resources law. Most notably, he is co-author of the Institute's *Canada Energy Law Service* and co-author of *Canadian Environmental Law,* published through Butterworth's.

"Environmental Law in the 1980s: A New Beginning"

Banff Centre, November 27-29, 1981

In the Fall of 1981, the Institute received a contract from the federal Department of the Environment to prepare a report on future directions in environmental law. The environmental movement of the early 1960s had precipitated a burst of legislative activity: federal and provincial departments of environment were established; numerous pieces of environmental protection legislation were enacted; and a variety of environmental assessment and review procedures developed. In essence, a separate field of law emerged. It seems, however, that environmental law has lost some of its early dynamism. One reason for this may be a failure by environmental lawyers to appreciate the fundamentally different nature of many environmental problems in the 1980s. The question then arises whether environmental law, as we know it, is suited to the current demands placed upon it.

To address this problem, a Colloquium was convened to examine the extent to which the existing conceptual base of environmental law constituted a barrier to the development and implementation of optimal environmental policies for Canada. Where appropriate, it sought to lay new conceptual foundations.

Over 50 participants attended, including representatives of government, industry, and public interest groups. Presentations focussed on environmental law at the limits of incremental development; the limits of the management concept; procedure in environmental regulation; the problems of proof, scientific uncertainty

and enforcement; and new directions in international environmental law.

A summary of recommendations arising from the Colloquium will form the basis of the report to the Department. In addition, the Institute will publish the complete proceedings.

Publications

Canada Energy Law Service

The Institute, in conjunction with Richard De Boo Ltd., has recently published the three volume "Canada Energy Law Service." This looseleaf service, designed to be updated at least five times a year, is under the general editorship of Connie Hunt and Al Lucas. The scope of the Service is defined by the jurisdiction of the various federal and provincial energy regulatory boards such as the National Energy Board and the Alberta Energy Resources Conservation Board. At present the Service covers the western provinces plus Ontario and the federal jurisdiction. For each board considered there is a text and commentary, plus a digest of board decisions and applicable judicial cases as well as a collection of legislation. Over the long term the Service will be extended to cover Quebec, the Maritime Provinces and the regulation of utilities in the Territories. Of more pressing concern however will be extensions in the federal part of the Service to cover aspects of the new Energy Security Bill, notably the Canadian Ownership and Control Bill and the Petroleum Incentives Program.

The Service gives great weight to the jurisprudence developed by the individual boards, and recognizes the importance of board decisions in interpreting legislative mandates. To date, these decisions have been poorly published and difficult to obtain. By publishing selected decisions, in a digested form, with accompanying commentary, the Institute hopes to make board jurisprudence more accessible to lawyers, accountants, and consumer and environmental groups. The Service argues the point that it is insufficient merely to study legislation and decided judicial cases. Greater attention must be given to tribunals actively engaged in interpreting and applying statutory rules.

Environmental Regulation - Its Impact on Major Oil and Gas Projects: Oil Sands and Arctic, by Constance D. Hunt and Alastair R. Lucas, 1980. ISBN 0-919269-00-1. $10.95.

This study assesses the impact of environmental regulation on the oil and gas industry in the Alberta oil sands and in the Canadian Arctic.

The first two sections of the study scrutinize the relevant legislation. Each of these sections contains a general description of the formal requirements of both legislation and policy directives, as derived from statutes, regulations, and government policy documents. The impact of these regulations on the industry is analysed.

The study then turns to an assessment of the public and private costs associated with environmental regulation of oil sands and the Arctic. Benefits of environmental regulation are discussed.

The study exposes inconsistencies, uncertainty, duplication and overlap in environmental regulation of major oil and gas projects. Its value lies in its objective assessment that these problems present difficulties for each of industry, government and the public.

The study was undertaken through the Canadian Institute of Resources Law for the Economic Council of Canada as one of a number of studies of environmental regulation carried out as part of the Council's Regulation Reference.

Resources Law Bibliography, 1980. ISBN 0-919269-01-X. $19.95

The Bibliography reflects the holdings of The University of Calgary Law Library as of January, 1980. It covers Natural Resources (soil, land, forests and forestry, wildlife); Energy Resources (solar, geo-thermal, hydro -electric, tidal, biomass); Oil and Gas; Nuclear Energy; Mines and Mineral Resources; Water Resources; The Ocean; The Environment; and Pollution. It is indexed by author and title.

The Bibliography is not restricted in its usefulness only to those having direct access to the Law Library at The University of Calgary. Many of the works catalogued are accessible in other law libraries, and all material can be borrowed from The University of Calgary Law Library by inter-library loan.

Bill C-48: A Framework for Comparative Analysis, 1981. $5.00.

This was originally submitted as a brief to the House of Commons Standing Committee on National Resources and Public Works at its hearings on Bill C-48. A further presentation of the brief was made to the Senate Committee dealing with the Bill. The paper compares the basic terms of offshore petroleum licensing regimes in Canada and other selected jurisdictions including Norway, the United Kingdom, the United States, Denmark and Australia.

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