

THE CASTLE – A LITMUS TEST FOR ALBERTA'S 'COMMITMENT' TO SUSTAINABLE RESOURCE AND ENVIRONMENTAL MANAGEMENT

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Introduction

Commitments to achieve sustainability are common currency in political speeches, government policy, and sometimes even in legislation. In Alberta, rhetoric about sustainability and the 'Alberta Advantage' is backed by specific policy direction and explicit statutory language. Nonetheless, critics consistently argue that Alberta is failing to achieve sustainability 'on the ground'.

One way to test Alberta's 'commitment' to sustainability is to examine the government's track record in areas of the province where concerns about land and resource use are particularly well documented. The Castle River area of southwestern Alberta (the Castle) is an ideal location for this type of analysis.

This article reviews ten years of decision-making on land and resource use in the Castle, summarizing the principal findings of a more detailed study published by the Canadian Institute of Resources Law.² Concerns about sustainability were front and centre throughout this decade of decision-making. Provincial government agencies, a local advisory group and elected municipal officials all identified threats to ecosystem sustainability in the Castle and underlined the urgent need for specific regulatory and management responses. The Government of Alberta's reaction to these conclusions and recommendations provides yet another affirmation of the old adage that 'actions speak louder than words'.

Alberta's 'Commitment'

Alberta's formal commitment to sustainability is embodied in legislation and policy. The *Environmental Protection and Enhancement Act* (EPEA) is intended "to support and promote the protection, enhancement and wise use of the environment."³ EPEA's purpose section recognizes "the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations".⁴ It affirms as well that "the protection of the environment is essential to the *integrity of ecosystems*."⁵ EPEA's environmental assessment process is also directed to supporting the goal of "sustainable development".⁶

Both the Energy and Utilities Board (EUB) and the Natural Resources Conservation Board (NRCB) apply statutory 'public interest' tests that require attention to economic, social and environmental effects when reviewing proposed projects – thereby incorporating the three 'pillars' of sustainable development.⁷ This statutory mandate has led the NRCB to develop explicit sustainability criteria for its project review process.

More specific guidance on sustainability is found in a policy document entitled *Alberta's Commitment to Sustainable Resource and Environmental Management* (*Alberta's Commitment*).⁸ The Premier's Forward states that this policy "reconfirms" the government's commitment to sustainable development and "describes" Alberta's approach to sustainable resource and environmental management.⁹

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RÉSUMÉ

Cet article examine une série de décisions importantes prises entre 1993 et 2002 concernant l'affectation du territoire dans la région de Castle River au sud-ouest de l'Alberta. Quatre thèmes se dégagent des décisions de cette décennie: 1) l'écosystème de cette région est menacé; 2) l'aménagement du territoire dans la région est inadéquat; 3) l'utilisation de la région par les véhicules tout-terrain n'est pas gérée de façon satisfaisante; et 4) les organismes de gestion des ressources sont fragmentés par secteurs et juridictions. La réponse du gouvernement de l'Alberta à ces problèmes permet de mesurer son engagement à mettre en oeuvre un système de gestion durable des ressources et de l'environnement.

Alberta's Commitment is far from a detailed sustainability strategy or plan of action. Nonetheless, it does include the following objectives and policy directions:

- The sustainable use of Alberta's natural resources means that "Renewable resources shall be managed to ensure their long-term viability and future use potential."¹⁰
- "Resources shall be managed on an integrated basis", recognizing that "the use of one resource can affect other users and other resources."¹¹
- The integrated basis for natural resource and environmental management includes "comprehensive forest and water planning."¹² Furthermore, "The sustainable development vision and direction and integrated planning, including existing plans such as Integrated Resource Plans and other approved resource plans, will provide the context for all operational management decisions."¹³
- Consultation on resource and environmental management decisions shall include "Ensuring integrated interdepartmental review and decision-making at the regional and provincial level."¹⁴
- "Compliance with Alberta's resource and environmental management requirements shall be assured."¹⁵

An "effective and up-to-date" legislative and regulatory regime is also identified as important for achieving sustainable development.¹⁶ *Alberta's Commitment* states that: "We need now to ensure that our policies, laws and regulations reflect the principles of sustainable development and integrated resource management"¹⁷

The policy direction set out in *Alberta's Commitment* confirms that sustainability means long-term viability for the province's renewable resource base and the maintenance of options for its future use. This standard applies, presumably, to the management of human activities that affect, directly or indirectly, renewable resources such as forests, water, wildlife and ecosystems.

Alberta's Commitment also highlights key institutional strategies for achieving sustainability, notably integrated resource management and the use of comprehensive planning to guide operational decisions.¹⁸ The government's own policy thus provides useful benchmarks for evaluating whether or not the 'commitment' is being implemented in practice.

The Castle

Located in the Rocky Mountains and foothills between Waterton Lakes National Park and the Crownsnest Pass, the Castle embodies many of Alberta's finest features and defining characteristics. Ranching, tourism and resource development are economically important activities. Several small communities and a scattering of rural residences have been established in and around the Castle. Spectacular scenery and productive wildlife habitat provide numerous opportunities for outdoor recreation. Biodiversity in the area is provincially significant, second only to Waterton Lakes National Park.¹⁹ The Castle is also a vital north-south link in North America's Rocky Mountain ecosystem.

This abundance of riches makes land and resource management particularly challenging in the Castle. Offering something to almost everyone, the Castle is a real world laboratory for sustainable development.

Decade of Decision-Making

This article focuses on four land-use decisions by the Alberta government that have far-reaching implications not only for the Castle, but also for the broader Crown of the Continent ecosystem that extends through southwestern Alberta, southeastern British Columbia and northern Montana. These decisions clearly show how Alberta's 'commitment' to sustainable management is playing out in the Castle.

The first decision concerned a proposal to transform a small ski facility in the West Castle Valley into a four-season destination resort.²⁰ The plan included expanded ski terrain, additional ski lifts, two 18-hole golf





courses, and a village complex consisting of hotels, restaurants, other commercial facilities, condominiums, townhouses and parking for recreational vehicles (R.V.s). The Alberta government ordered an environmental assessment under the predecessor legislation to EPEA, and the project was referred to the Natural Resources Conservation Board (NRCB).²¹

The NRCB conducted extensive public hearings and issued a lengthy decision report in late 1993.²² Having interpreted its 'public interest' mandate as requiring the application of criteria for sustainable development, it examined the direct and indirect effects of the proposed project from economic, social and environmental perspectives.²³ In particular, the Board affirmed that "the sustainability of ecosystems is the proper frame of reference when assessing environmental impacts."²⁴ It concluded that the project as proposed was not in the public interest, but that approval would be granted if two conditions were met.

The first condition involved changes to the project's design in order to reduce impacts on the important wildlife movement corridor in the West Castle Valley. The second condition was the establishment of stricter land-use controls and a new management regime for about 800 km² of surrounding public land. The NRCB viewed the creation of the Waterton-Castle Wildland Recreation Area (WCWRA) as essential to mitigate the development's contribution to regional cumulative effects.²⁵

The NRCB's conclusion that the adverse environmental effects of resort development in the West Castle Valley should be mitigated by designating much of the Castle as a protected area was supported by the project proponent and by environmentalists. However, the WCWRA was a lightning rod for opposition by off-road vehicle groups, forestry interests and others opposed to land-use restrictions. In May of 1995, the Government of Alberta bowed to pressure from opponents, rejected the NRCB's second condition, and thereby torpedoed this specific proposal for development in the West Castle Valley.²⁶

Protected area designation was also central to the second key land-use decision of the past decade. The nomination of the Castle under *Special Places 2000*,²⁷ Alberta's protected areas strategy,²⁸ was referred to a local committee for consideration in 1997. The committee recommended against establishing a large protected area in the Castle, although it did offer specific suggestions for improving land and resource management in the area.²⁹ Since local committees had a veto over nominations under *Special Places 2000*, the door was closed for a second time on protected area status for the Castle.

The third important land-use decision concerned energy development in the Castle. The EUB's Screwdriver Creek decision in 2000 was, in many respects, a routine approval of gas wells and associated infrastructure following a brief public hearing.³⁰ It thus followed a pattern of contested applications and project approvals in the Castle that stretches back to the 1980s.³¹ This decision included, however, some specific comments by the EUB on land and resource management in the Castle that were far from routine.

Development in the West Castle Valley closes the circle on a decade of decision-making in the Castle. Following the Alberta government's rejection of the NRCB's West Castle decision in 1995, a series of incremental additions to facilities at the ski hill were approved.³² These additions included new ski lifts, a new day lodge, a three-story ski rental building with commercial space, a restaurant, and a new wastewater treatment system. Eighty-eight residential leasehold lots were also established at the base of the ski hill, with permanent wood frame houses on the majority of these lots.

This incremental expansion paved the way for another comprehensive proposal for recreational, commercial and residential facilities in the West Castle Valley – the *Castle Mountain Resort Area Structure Plan* (ASP).³³ The development outlined in this proposal resembles the project reviewed almost ten years earlier by the NRCB in many respects, although it emphasizes skiing as the primary purpose does not include plans for golf courses.³⁴ The ASP does anticipate:³⁵

- expanded ski terrain and additional ski lifts;
- total build-out for accommodation equivalent to 225 housing units (750-900 beds) – including a hotel, a hostel, numerous multifamily housing units, possibly additional single-family units, and at least 50 R.V. stalls;
- "complementary base area facilities", including restaurants, pubs, retail space, a recreational centre, arcades and amusement facilities, offices, etc.; and
- ancillary development, such as parking space and a maintenance and storage compound.

Alberta Environment reviewed this proposal, but decided not to require a detailed environmental impact assessment report under EPEA and not to send the proposal to the NRCB for public hearings.³⁶ The only public review of the ASP was a brief hearing conducted by the Council of the Municipal District of Pincher Creek (M.D. Council) pursuant to its planning authority under the *Municipal Government Act*.³⁷ Although the project's impacts on surrounding public lands were raised by many participants in the hearing, these issues were beyond the direct authority of the M.D. Council. The ASP for Castle Mountain Resort received municipal approval in 2002.³⁸

The following discussion focuses on four key themes that run through this ten-year experience. Decision-makers agreed that ecosystem sustainability in the Castle is at risk and identified several major deficiencies in Alberta's legal, policy and institutional framework for land and resource management.

The Castle Ecosystem at Risk

The NRCB discussed in detail the nature, extent and causes of ecosystem "deterioration" across the Crown of the Continent ecosystem





and within the Castle.³⁹ The Board expressed particular concern about habitat fragmentation and associated disturbance resulting from incremental development and increased recreational use. It found that “the ecological resources of the area may not be sustainable even with existing use, to say nothing of the risk to these resources if a permanent development were placed in the area along with uncontrolled existing uses.”⁴⁰ The NRCB concluded that the Crown of the Continent ecosystem is at risk, the Castle has deteriorated, and “the public interest would not be served by allowing that deterioration to continue.”⁴¹

The report of the Castle Local Committee differed in important ways from the NRCB’s West Castle decision. In particular, the report provided no detailed information on regional ecosystems and reached a different conclusion on the appropriateness of protected area designation for the Castle. Given the committee’s composition and the fact that its mandate did not require it to hold public hearings or review scientific evidence regarding the state of the Castle ecosystem,⁴² its cursory treatment of this topic is, perhaps, not surprising.

While the local committee commented that “the Castle has maintained its rich plant life and wildlife populations in conjunction with man,”⁴³ it was also clearly concerned about ecological risks. In particular, it called for improved management of the area because “there are limits to the impact that the Castle can sustain.”⁴⁴ The local committee also noted the need to address the multiple demands on the Castle’s resources by striking a balance “with particular emphasis on the retention of wildlife populations and the biodiversity in animal and vegetation populations.”⁴⁵

The EUB’s Screwdriver Creek decision includes a brief but pointed discussion of risks to ecological sustainability in the Castle. It notes that “both the public and the industry participants [in the hearing] took a common view that it was possible or even likely that the biological thresholds for at least some key species identified as important in the IRP [*Castle Subregional Integrated Resource Plan*] may now have been exceeded in the region.”⁴⁶

The EUB also commented on the long history of public concern with the environmental impacts of incremental development in the Castle. It concluded that “The evidence provided at this hearing suggests that at least some of the predicted environmental effects may now be occurring, although clearly not only because of oil and gas development.”⁴⁷

The M.D. Council did not issue a decision report when it approved the ASP for Castle Mountain Resort. Nonetheless, there is evidence that the Reeve and Councilors were well aware of risks to the Castle ecosystem. In a letter to the Honourable Mike Cardinal, Alberta’s Minister of Sustainable Resource Development, they stated that their “one major outstanding concern” was “the impact the expansion will have on the environment in the surrounding public lands”.⁴⁸ The M.D. Council highlighted threats to wildlife habitat and movement, noting that the NRCB and the EUB had “previously expressed concern over the sustainability of the ecosystem in the Castle area”.⁴⁹

Concerns about ecosystem sustainability in the Castle are old news for environmental groups that have a long history of opposing incremental development in the region and arguing for improved management and a large protected area.⁵⁰ The record summarized above shows that the NRCB, the EUB, the Castle Local Committee and the Reeve and Councilors of the Municipal District of Pincher Creek agree that the Castle ecosystem is at risk. All of these bodies also offered their views on the changes to resource and environmental management that are necessary to ensure sustainability.

Planning for the Last War—The Castle IRP

The relationship between individual projects, cumulative environmental effects and regional land-use issues is central to the debate about resource and environmental management in the Castle. Not surprisingly, decision-makers seek guidance on the regional context from official sources. In the Castle, the logical place to look is the *Castle River Subregional Integrated Resource Plan (Castle IRP)*.⁵¹

Approved in 1985, the *Castle IRP* embodies a ‘multiple-use’ approach to management, relies primarily on land-use zoning, and explicitly states that it has “no legal status”.⁵² It thus bears the hallmarks of the Eastern Slopes Policy, as revised in 1984,⁵³ and exhibits the well documented deficiencies of Alberta’s IRPs.⁵⁴ Specific comments by the NRCB, the Castle Local Committee and the EUB highlight the inadequacy of the *Castle IRP* as a tool for sustainable resource and environmental management.

The NRCB stated that it could not “reach a determination of whether or not the proposed project is in the public interest without fairly detailed consideration of the land use planning and ongoing management structures for the area.”⁵⁵ This analysis focused particularly on the *Castle IRP*, highlighting the limitations of zoning as a management tool and the need to address the intensity of land use in planning and access management.

The NRCB’s main concern with zoning was “the proliferation of different land use zones in a relatively compact geographical area of ecological value.”⁵⁶ While the proposed resort development was consistent with the “Facility Zone” designation for the West Castle Valley ski area, the Board clearly felt that a project of this magnitude was inconsistent with land-use objectives for the Castle-Carbondale Corridor and for land immediately adjacent to the ski area that was zoned under the categories of Prime Protection, Critical Wildlife and General Recreation.

This conflict, the Board concluded, was symptomatic of a deeper problem:

“... the concept of integrated resource management set out in the *Eastern Slopes Policy* and other public lands planning and policy documents [e.g., the *Castle IRP*] may create unrealistic expectations by the public that we can ‘have it all,’ particularly where relatively small geographic areas are concerned. ... the





Board believes that it must be recognized that sustainable development may not be achievable unless integrated resource management is understood to mean that uses may be permitted, but in more discrete areas than have been available in the past; i.e., that certain areas may be designated for certain land uses only and other uses may be prohibited in the same areas in order to protect the natural resource.⁷⁵⁷

Furthermore, the NRCB noted that while the “long list” of land uses permitted under the *Castle IRP* was “generally acceptable to participants and particularly to the specific users, it was the *existing intensity of land use and the associated environmental impacts and cumulative effects that was cause for concern.*”⁷⁵⁸ The *Castle IRP*, however, provides no guidance regarding the acceptable intensity of land and resource use.

The West Castle decision leaves no doubt that the NRCB viewed existing management tools – notably the *Castle IRP* – as inadequate to ensure ecosystem sustainability. The WCWRA was a direct response to this problem. The Board stated that “appropriate land use controls would be essential to mitigate the significant adverse effects of locating the resort in such an ecologically important region, and are necessary *in any event* given the risk of environmental deterioration if pressures for existing uses continue to increase.”⁷⁵⁹

The Castle Local Committee also raised concerns with planning and ‘multiple-use’ management in the Castle. Although it rejected the proposal to switch the Castle from a ‘multiple-use’ designation to a protected area, the committee felt “compelled to make recommendations for a *sensitive* multiple use management of the entire Castle area” and it stated that its recommendations “provide clear direction for *enhancement* of multiple use management that will protect the unique combination of resources in the Castle.”⁷⁶⁰

Like the NRCB, the Castle Local Committee commented specifically on the inadequacy of the *Castle IRP*. The committee expressed particular concern “about the lack of commitment by Alberta Environmental Protection to keep the IRP or any plan current and ‘alive’.”⁷⁶¹ It therefore recommended that the *Castle IRP* be “legislated”, incorporating into law the boundaries and management strategies that it proposed for the Castle Special Management Area and including “direction for implementation, updating and monitoring.”⁷⁶²

More generally, the Castle Local Committee recognized the need for “strict guidelines” to minimize the impact of industrial and commercial development.⁶³ Particular issues of concern were the proliferation of access routes for forestry and oil and gas operations and the potential future expansion of the ski resort in the West Castle Valley, notably the risk that residential and facility structures would conflict with wildlife corridors and user access.

The inadequacy of the *Castle IRP* was also a central theme in EUB’s discussion of cumulative effects management in the Castle. After noting the broad consensus that biological thresholds for certain species may already have been exceeded, the Board stated that: “This would appear

to strongly suggest that the publicly available planning tools for the region may now be outdated and inadequate to address the current level of development.”⁷⁶⁴

The failure of the *Castle IRP* to provide guidance on the acceptable level of development and intensity of activity was singled out by the EUB for criticism. In particular, the Board stated that the absence of “threshold values” against which to measure ecological effects made it “difficult for an applicant, the public, or the Board to evaluate to what degree incremental impacts from new development would be acceptable.”⁷⁶⁵ It also concluded that, without these thresholds, it was not possible “to determine what mitigative actions, such as facility, road, or cut-line abandonment and reclamation in other portions of the region, might be used to reduce the cumulative effects to suitable levels.”⁷⁶⁶

The NRCB, the Castle Local Committee and the EUB all found it impossible to evaluate specific land-use proposals in the Castle without attention to the broader regional context. When they turned to the *Castle IRP* for guidance, however, all three bodies found it to be inadequate. Furthermore, they all agreed that a new approach to land-use planning is essential for managing cumulative environmental effects and thereby protecting important environmental values in the Castle.

The past decade of incremental development and hand wringing by decision-makers in the Castle illustrates very well the limitations of Alberta’s IRP process. The combination of excessive reliance on land-use zoning, long lists of permitted activities, and a ‘multiple-use’ management strategy that lacks a clearly defined land ethic and an ecological bottom line is a recipe for ecosystem deterioration. Managing cumulative effects and overcoming the ‘tyranny of small decisions’ requires an enhanced and integrated planning framework – as recognized in *Alberta’s Commitment to Sustainable Resource and Environmental Management*. Without this critically important tool, delivering on the ‘commitment’ will be impossible in areas like the Castle.

Access (Mis)management

Access management was a recurring issue in the Castle over the past decade. The NRCB noted in 1993 that environmental deterioration in the Castle can be traced to the fact that roads, trails, seismic lines and logging “have fragmented habitat, reduced habitat effectiveness and opened up large parts of the area to *uncontrolled* access.”⁷⁶⁷ Commenting specifically on human activities affecting grizzly bears, the Board noted that “permanent occupied structures, permanent roads, and continuing off-road travel by motorized vehicles are the most disruptive impacts.”⁷⁶⁸

Resort development in the West Castle Valley would not, of course, increase road and trail access to the backcountry directly. Nonetheless, the NRCB was concerned about the indirect effects of a development of that scale. The Board specifically stated that it “does not accept the Applicant’s suggestion that resort users might confine their activities to the recreational opportunities on the resort site”, concluding instead that they would also make substantial use of surrounding public land.⁶⁹





The NRCB noted that the *Castle River Access Management Plan* “dealt only with the location and use of access in winter or summer *but not with the intensity or management of the many uses.*”⁷⁰ This plan thus exhibits the same key deficiency as the *Castle IRP* – a failure to include intensity thresholds to complement spatial restrictions on activities.

The Castle Local Committee commented that the land manager “must have the necessary tools to redress situations including access and random camping.”⁷¹ It urged the Alberta government to provide the funding and staff required to ensure implementation of the educational, enforcement, monitoring and engineering components of the *Castle River Access Management Plan*.⁷² The committee also proposed that access management be given a firm legal basis in the form of a Forest Land Use Zone regulation.⁷³

The EUB’s assessment of cumulative effects management in the Screwdriver Creek decision did not mention the *Castle Access Management Plan* by name. However, its comment that “the publicly available planning tools” may be “outdated and inadequate” could be taken as referring to this plan as well as to the *Castle IRP*.⁷⁴ The Board’s identification of road and cut-line abandonment as a potential mitigation strategy for cumulative effects demonstrates that it was aware of the access management problem. Finally, it reported that one intervener “did not believe that there could be effective enforcement of the existing regional access management plan due to the high density of access points already in the region.”⁷⁵

Access management was also centre stage when the M.D. Council considered the ASP for Castle Mountain Resort in 2002. In their letter to the Minister of Sustainable Resource Development, the Reeve and Councillors stated that: “Our specific concern relates to the potential for increased wildlife disruption resulting from *virtually unabated off road vehicle access and random camping* in the Castle River area.”⁷⁶ They also noted their belief that this type of use would be increased by the expansion of Castle Mountain Resort and their perception that “access by motorized vehicles is the single most significant deterrent to sustainable wildlife habitat and movement in the area.”⁷⁷

The M.D. Council’s letter also recommended six changes to the *Castle River Access Management Plan*:

- “1. Significantly reduce or eliminate the summertime motorized access to the back country
2. Implement better control of winter snowmobile access
3. Install signs to direct and control motorized vehicle access
4. Strengthen the education component of the Access Management Plan
5. Step up enforcement of the Access Management Plan
6. Restrict camping to designated campgrounds”.⁷⁸

The letter concluded by expressing the hope “that these changes will facilitate increased overall access by Albertans without destroying the natural setting they come to enjoy.”⁷⁹

The record of the past decade leaves no doubt that access management – particularly relating to off-road vehicle use – remains severely deficient in the Castle. While the Castle Local Committee’s recommendation of a Forest Land Use Zone regulation for the Castle was implemented, it appears that the practical effect of ten years of baby steps on this issue has been to move from what the NRCB referred to as “uncontrolled” access to what the M.D. Council characterized as “virtually unabated” access.

Institutional Fragmentation

The final common theme of the past decade of decision-making in the Castle – the absence of an integrated institutional framework for resource and environmental management – goes right to heart of the approach to sustainability described in *Alberta’s Commitment*. Here again, the record suggests broad agreement on both the problem and the solution.

The NRCB recognized that simply establishing a protected area in the Castle would not, by itself, ensure ecosystem sustainability. Given the multitude of agencies that are “in a position to make key decisions affecting the sustainability of the natural resources in the proposed WCWRA”, the Board called for “an integrated management approach on both a strategic and a day-to-day level.”⁸⁰ It therefore recommended that the Government of Alberta establish a new management structure for the WCWRA.⁸¹ The NRCB also highlighted the need for formalized intergovernmental arrangements with neighbouring jurisdictions in order to ensure ecosystem-based management across the broader region.⁸²

The Castle Local Committee touched only briefly on integration, although it did note that the Castle is part of a broader transboundary area within which “there are a variety of land management strategies that strive to protect land and resources.”⁸³ Its specific recommendation was that “in order to preserve the Castle, the entire Castle watershed must be addressed as one management area within which a wide variety of uses are accommodated.”⁸⁴

Finally, the EUB appealed for “an updated integrated resource management strategy” to provide it with the information required “to ensure that future energy development in the region continues to be environmentally acceptable.”⁸⁵ Another option that it identified is the development by land management agencies of “strategies to address the future cumulative effects of human activities, including energy development, in the Castle Crown region.”⁸⁶

Incremental decision-making and the fragmentation of management authority along jurisdictional and sectoral lines is a well-recognized impediment to sustainable resource and environmental management. This problem is especially acute in the Castle, since institutional fragmentation within the Alberta government is compounded by the patchwork of management authority across the broader Crown of the Continent ecosystem.⁸⁷



Testing the 'Commitment'

Having described the principal conclusions and recommendations from the past ten years of land-use decisions in the Castle, it is appropriate to return to the core elements of Alberta's 'commitment' to sustainable resource and environmental management that were set out at the start of this article. Comparing the government's 'commitment' with its record reveals some stark contrasts.

Despite the well-documented findings of the NRCB regarding risks to ecosystem sustainability in the Castle, Castle Mountain Resort has been permitted to grow into a permanent residential and commercial community. This development has occurred without the designation of a large protected area in the Castle – the explicit condition established by the NRCB for the earlier proposal for development at the ski hill – and without any other significant steps to address cumulative environmental effects, inadequate access management and institutional fragmentation.

Furthermore, the Alberta government declined to require a detailed environmental impact assessment report under EPEA for the Castle Mountain Resort ASP, despite the references to "sustainable development" and the "integrity of ecosystems" contained in the purpose sections of this statute. This decision also precluded a review of the project by the NRCB. The Castle Mountain Resort ASP was thus approved without a full environmental assessment to determine the project's direct and indirect effects on surrounding public land and without a public hearing to evaluate, in an open and transparent manner, whether or not the findings and conclusions of the NRCB's West Castle decision remain relevant to ongoing development in the West Castle Valley.

Alberta's statutory 'commitment' to sustainable resource and environmental management is also embodied, albeit indirectly, in the 'public interest' mandates of the EUB and the NRCB. The Screwdriver Creek decision shows, however, that the EUB continues to approve incremental development in the Castle despite its candid admission that the absence of thresholds makes it "difficult" to evaluate the acceptability of impacts from new development and impossible to determine what mitigation measures would reduce cumulative effects to suitable levels. As noted above, the significant expansion of Castle Mountain Resort was not even reviewed by the NRCB, despite the obvious similarities with the earlier project proposal that the Board examined in 1993.

When one turns to the policy set out in *Alberta's Commitment*, the gap between rhetoric and reality is – if anything – even wider. This gap is evident both from the record of the past ten years and from the Alberta government's failure to ensure that two more recent initiatives will bring resource and environmental management in the Castle in line with the 'commitment' to sustainability. In particular:

- Repeated findings that environmental values are at risk in the Castle suggest that human activities are not being managed in a manner that ensures the sustainability (i.e., the long-term viability

and potential for future use) of the regional ecosystem and the specific renewable resources that it supports.

- Integrated resource management in the Castle is not a reality. Incremental and sectoral decision-making still predominates, as illustrated by the EUB's ongoing approval of energy development. A narrow, sectoral approach to resource management is also embodied in the terms of reference for the C5 Forest Management Plan,⁸⁸ a regional planning initiative currently being undertaken by the Department of Sustainable Resource Development.⁸⁹
- The provincial government's integrated resource management initiative, led by Alberta Environment, includes an ambitious "regional strategy" for southern Alberta.⁹⁰ Phase 1 of this strategy, however, is focusing on issue identification, data collection, and the development of land-use scenarios. While the Southern Alberta Sustainability Strategy has potential, Phase 1 does not appear to be the kind of planning process or integrated management initiative that will directly influence land-use decisions in the Castle.
- Comprehensive land-use planning in the Castle is deficient in important respects and fails to provide an adequate "context for all operational management decisions" as referred to in *Alberta's Commitment*.⁹¹ The 1985 version of the *Castle IRP* is still in force and a process to revise that plan that was initiated in the late 1990s, following the report of the Castle Local Committee, has not been completed. The last public version of the draft plan was apparently circulated in 2001, but is no longer readily available.
- Interdepartmental and interagency coordination at an operational level is difficult to assess, but the Screwdriver Creek decision suggests that the EUB is increasingly frustrated with the failure of land managers to provide a framework for cumulative effects management. The terms of reference for the C5 Forest Management Plan pay only lip service to interdepartmental cooperation.⁹²
- The Alberta government's IRM initiative⁹³ has not yet yielded any specific recommendations for changes to ensure that Alberta's policies, laws and regulations as they apply in the Castle "reflect the principles of sustainable development and integrated resource management."⁹⁴
- Finally, concerns regarding the effectiveness of the *Castle River Access Management Plan* suggest that the Alberta government has some way to go in ensuring compliance with existing requirements.

Conclusion

The decade of decision-making reviewed in this article points to a systematic failure by the Government of Alberta to give practical effect





to its 'commitment' to sustainable resource and environmental management. It also demonstrates clearly the urgent need for a new initiative to achieve ecosystem sustainability in the Castle. Establishing a protected area in the Castle, as suggested by the NRCB, is one way to move towards ecosystem sustainability – but it may not be the only option. Perhaps a broader range of uses can continue to be permitted, subject to an enhanced and integrated management regime that regulates the intensity of human activity and includes mechanisms to prevent and mitigate cumulative environmental effects.

While there may be different ways of implementing sustainable resource and environmental management in the Castle, the *status quo* is certainly not one of them. The common message from the NRCB, the EUB, the Castle Local Committee and the M.D. Council is that the Alberta government's current approach to managing the Castle is badly broken and needs to be fixed. The government's response to this issue will have profound implications for the future of the Castle and for the Crown of the Continent ecosystem as a whole. It is also a litmus test for Alberta's 'commitment' to sustainability.

- ♦ Mr. Kennett is a Research Associate at the Canadian Institute of Resources Law. This article is part of a research project funded by the Alberta Law Foundation. Carla Tait provided research assistance.

Notes

1. The Premier's Forward in the government's principal policy statement on sustainable resource and environmental management states that: "This document supports the Alberta Advantage, which recognizes the need to balance opportunities for growth with the need to preserve and maintain our rich environment for future generations." See: Government of Alberta, *Alberta's Commitment to Sustainable Resource and Environmental Management* (March 1999) at 1 [hereinafter *Alberta's Commitment*].
2. Steven A. Kennett, *Spinning Wheels in the Castle: A Lost Decade for Sustainability in Southwestern Alberta*, CIRL Occasional Paper #14 (Calgary: Canadian Institute of Resources Law, 2003).
3. R.S.A. 2000, c. E-12, s. 2.
4. *Ibid.*, s. 2(c).
5. *Ibid.*, s. 2(a) (emphasis added).
6. *Ibid.*, s. 40(a).
7. *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, s. 3; *Natural Resources Conservation Board Act*, R.S.A. 2000, c. N-3, s. 2.
8. *Alberta's Commitment*, *supra* note 1.
9. *Ibid.*, at 1.
10. *Ibid.*, at 4.
11. *Ibid.*, at 4.
12. *Ibid.*, at 6.
13. *Ibid.*, at 6.
14. *Ibid.*, at 7.
15. *Ibid.*, at 9.
16. *Ibid.*, at 8.
17. *Ibid.*, at 8.
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 84. *Ibid.*, at 10.
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BOOK REVIEW

UNNATURAL LAW: RETHINKING CANADIAN ENVIRONMENTAL LAW AND POLICY by David R. Boyd **

Steven A. Kennett ***

Unnatural Law is a remarkable book with an ambitious agenda. Its objectives are threefold: (1) to assess the effectiveness of Canadian environmental law and policy; (2) to examine the reasons for our success – or lack thereof – in meeting environmental challenges; and (3) to identify legal and policy changes that would make Canada a global leader in the quest for sustainable development. *Unnatural Law* thus tackles head-on the toughest issues in one of the most complex and important areas of contemporary law and public policy.

David Boyd brings a formidable array of skills and experience to this daunting task. A public interest environmental lawyer and former Executive Director of the Sierra Legal Defence Fund, Boyd is also an environmental activist, a professor, a frequent contributor to public debate on environmental issues, the author of several reports on Canada's environmental record, and the editor of a fine collection of contemporary Canadian nature writing.

Boyd clearly has the background to make sense of Canadian environmental law and policy. *Unnatural Law* confirms that he also has the talent and vision to deliver on the sweeping objectives that he set for this book. Boyd combines meticulous attention to detail with an unerring eye for the big picture. *Unnatural Law* is comprehensive, without being superficial. It provides a compendium of policy options across a broad range of issues. Boyd's exhaustive footnotes and extensive reference list attest to the depth and breadth of his research and provide readers with an invaluable resource. To top it off, his writing is fluid and precise.

Unnatural Law provides incisive and balanced analyses of Canada's most contentious environmental issues. Boyd's 'green' credentials are impeccable, but he 'calls a spade a spade' when debunking hyperbole from either side of the debate. On federal endangered species legislation, for example, he quotes heated rhetoric from the David Suzuki Foundation on one side and from the Canadian Cattlemen's Association, the Canadian Federation of Agriculture, the Fraser Institute and the Western Stock Growers' Association on the other – and then coolly states that "Neither of these extreme perspectives is accurate."

The scope of this book, however, goes well beyond a careful analysis of our existing legal and policy regime and an assessment its relevance to the current crop of environmental issues. *Unnatural Law* challenges the dominant paradigm, scrutinizing the underlying causes of environmental degradation and setting out a detailed set of legal and policy options to move forward towards a sustainable society.





The Examination

Part One of *Unnatural Law* examines Canada's environmental record in four areas: water, air, land and biodiversity. Each of these topics is divided into sections dealing with specific issues – drinking water, climate change, pesticide regulation and endangered species, to give one example from each chapter. Relying heavily on data from the OECD and other official sources, Boyd traces Canada's environmental record and compares it with results obtained in other industrialized countries. On this basis, he assesses the adequacy of our existing legal and policy regime. The picture is not a pretty one.

Boyd cites conclusive evidence that Canada's environmental record is one of the worst in the industrialized world. Among OECD countries, Canada stands second last when ranked on a suite of environmental indicators. Boyd also documents some spectacular policy failures – from contaminated drinking water to the collapse of northern cod stocks. Several recurring themes emerge from this litany of failure. More often than not, Canada's disappointing environmental performance is a product of government cutbacks and a systematic pattern of discretionary powers that have not been exercised, laws and regulations that have not been enforced, and promises that have not been kept.

The situation is not, of course, completely bleak. Canada has been remarkably successful in largely eliminating ozone-depleting chemicals. Some types of pollution affecting air and water quality have been substantially reduced. Significant amounts of land were set aside as protected areas over the past decade, although Boyd notes that many of these areas lack effective legal protection and face both external and internal threats to their ecological integrity. These and other success stories are documented in *Unnatural Law*.

For each topic, Boyd analyses the strengths and – more often – the weaknesses of Canadian law and policy. He selectively covers federal, provincial, territorial and municipal jurisdictions, reviews relevant case law, and comments on the effectiveness of environmental litigation. Boyd also describes the international legal regime and reviews environmental initiatives in other countries that shed light on the Canadian experience.

The Diagnosis

Part Two of *Unnatural Law* – the diagnosis – brings together the key themes from the preceding chapters. To begin, Boyd surveys explanations for Canada's environmental success stories. The strength of our social, political and economic institutions provides a foundation for action that is lacking in many countries. Pressure from international and domestic sources, progressive decisions from the Supreme Court of Canada, proactive local governments, and federal-provincial cooperation are among Boyd's explanations for success. He also points to the presence of effective laws and regulations – although this point begs two deeper questions. Why are some legal and policy instruments

more effective than others? Why have Canadian governments have been active in some areas and not in others?

Boyd's answer to these questions comes in chapters that analyze systemic weaknesses in Canadian environmental law and policy and identify obstacles to future progress. Weaknesses include missing laws in key areas, the excessive discretion that is built into the environmental laws and regulations that we do have, inadequate implementation and enforcement, a failure to reflect the best available science, excessive reliance on voluntary initiatives, lack of meaningful opportunities for public involvement, and reliance on an overly narrow range of legal and policy instruments.

Unnatural Law covers these issues well, but as Boyd notes it is hardly uncharted territory. Many of these problems have been evident for decades. Boyd therefore turns to the 'structural' obstacles to corrective action. These obstacles include political, legal and institutional factors – powerful economic interests, international trade liberalization, tensions within our federal system, the absence of a separation of powers between legislative and executive branches of government, excessive concentration of power in the executive branch, and barriers to an effective role for the courts.

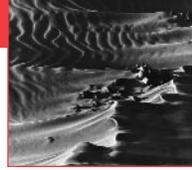
At this point, *Unnatural Law* reaches a fork in the road. One option is to undertake a conventional analysis of structural obstacles. Boyd chooses the road 'less traveled by', focusing instead on what he calls the "root causes" of environmental degradation. His rationale for this choice is simple and compelling. While legal and policy reforms directed at overcoming structural obstacles and correcting systemic weaknesses would improve Canada's environmental performance, "ultimately they would neither solve our environmental problems nor ensure a sustainable future."

Boyd bases this proposition on what might be called the 'American paradox' – the United States has arguably the strongest set of environmental laws in the world, but continues to perform abysmally when compared with other industrialized countries. On Boyd's ranking of OECD countries, it was the United States that beat Canada in the race for the bottom rung. He therefore rejects the American approach of merely treating the symptoms of environmental degradation, arguing instead that we must challenge directly "the dominant paradigm of endless economic growth based on ever-increasing consumption of energy and resources."

The Prescription

The third part of *Unnatural Law* sets out Boyd's 'prescription'. Action is needed, he argues, both at home and abroad. The challenge at home is to break the nexus between perceived quality of life, economic growth, and environmentally harmful consumption. In short, we need to shrink our ecological footprint. In the global arena, the fundamental problem is unsustainable population growth in the developing world.





At the heart of Boyd's domestic agenda is a new consumption 'ethic' – one that challenges us to do things differently in order to achieve the same or better results in overall quality of life while reducing significantly our demands on the planet's resources and assimilative capacity.

Unnatural Law presents a multitude of options for translating this ethic into action.

Part of this agenda involves recognizing both the virtue of getting by with less and the value of those things in life that really matter. Boyd cites studies showing that significant increases in material wealth over the past few decades have not led to higher levels of happiness in the industrialized world. He suggests that Canada adopt a holistic system of national accounting to replace the current economic model that deludes us into thinking that growth in GDP equates with progress towards a better life. Several models already exist for incorporating natural capital and human well being into measures of 'genuine progress'.

Boyd's vision of a sustainable future does not, however, involve turning back the clock on our material standard of living. *Unnatural Law* highlights the tremendous potential to reduce environmental impacts by increasing energy efficiency, switching to more environmentally benign production methods, and reducing waste. Progress in these areas requires reconfiguring the economic, regulatory and social incentive structures that drive individual decisions about how to produce and consume. Many mechanisms to do just that have already been adopted successfully in other countries. Boyd's examples show that being green does not require a regression in living standards, especially if those standards are measured in terms of 'genuine' human progress.

The second strand of Boyd's vision for the future targets the underlying causes of unsustainable population growth in the developing world. Canada and other wealthy countries can play a role, he argues, by providing development assistance designed to break the vicious circle of poverty, underdevelopment, inequality of women and economic insecurity that results in high birth rates and low standards of living in many developing countries. His call for action follows from both an ethical imperative and an instrumental argument.

The ethical imperative is rooted in the tremendous global disparities between rich and poor. As Boyd notes, Canada is home to one of the most affluent and educated societies in history. Canadians are also custodians of a piece of the planet that contains almost unimaginable natural wealth – water, minerals, forests, farmland, wildlife, ecosystems, space and beauty. In this context, Boyd argues, we have a moral obligation to reach out to those who are less fortunate.

Boyd's instrumental argument is based on the irrefutable logic of mathematics. He observes that a population growth rate of only one percent per year would take us from 6.1 billion people to over 16 billion in less than a century. This same growth rate would theoretically put 126 trillion people on Earth in a thousand years. In the long run, of course, nature will have its way – ecological collapse, disease and human conflict would ensure that this scenario never unfolds. The more immediate problem, as Boyd notes, is that our global ecological impact

is a function of both total population and per capita consumption – and we live, ecologically speaking, in a global village.

People in developing countries will only be able to meet their basic human needs and achieve a satisfactory standard of living if they can stabilize their populations at sustainable levels. Furthermore, even modest population growth in the developing world, combined with stable or increasing per capita consumption of energy and other resources, will eventually offset any measures that Canada and other industrialized nations can take domestically to reduce pressure on global ecosystems.

Citing lessons from the significant reduction in birth rates in many parts of the world over the past several decades, Boyd reviews ways that Canada could contribute to population stabilization. While *Unnatural Law* is obviously not intended to be the final word on population and development, it provides a concise summary of issues, options and opportunities.

Questions and Challenges

As with any ambitious and important book, *Unnatural Law* leaves some questions unanswered and some avenues unexplored. Even on issues that he does not address in detail, however, Boyd drops some useful hints and points the reader in the right direction.

One question concerns the practical challenge of adopting the Swedish 'role model' for sustainability. *Unnatural Law* provides a wealth of detail on the steps that Sweden and other northern European countries have taken to realign their social, economic and legal arrangements to address the over-consumption of resources and to share wealth, technology and knowledge with the developing world. The logic and practicality of European experiments with regulatory reform, economic incentives and policy other tools appear irrefutable. The record of Scandinavian countries on development assistance is inspiring.

Boyd's discussion of this model does not, however, revisit the 'structural' obstacles that have hobbled Canada's progress on the more modest agenda of developing an effective and comprehensive legal regime to protect the environment. Are these structural obstacles likely to impede progress in implementing the Swedish model described by Boyd? Have the Swedes found ways to overcome these obstacles, or do deep-rooted differences at the political, institutional and cultural level explain progress there and relative paralysis here? If at least some of this disparity is explained by structural and situational differences, how should Canadians address them?

In some respects, we are depressingly different from the Europeans that Boyd identifies as our role models. Canadians remain saddled with an obsolete frontier mentality that leads many of us to act as though our country is an inexhaustible storehouse of natural resources. Europeans, one suspects, abandoned that fiction long ago. Following the northern European path to sustainability will also be a challenge for Canadians because the overwhelming economic, political and cultural influence on





our country appears to be the 'giant sucking noise' of hyper consumption south of the border.

The reader is left to ponder the deeper question of how to overcome entrenched interests, institutional inertia and culturally engrained attitudes. Scandinavian countries present a striking contrast with Canada on a range of social and economic issues, in addition to their environmental performance. Perhaps the explanation is a sense of social solidarity and responsibility to future generations that we have yet to internalize. Emulating the Swedish role model may require Canadians to re-evaluate how we define our relationships with each other, with humanity as a whole, and with the planet that supports us.

A second and related issue is the striking disparity between what Canadians say they believe on environmental issues and how they actually conduct themselves. *Unnatural Law* includes numerous references to public opinion data that attest to Canadians' love of wilderness, appreciation of the value of biodiversity, concern with air and water quality, and deep commitment to leaving a sustainable legacy for future generations. These references are almost invariably followed by examples of actions by Canadians that are blatantly inconsistent with the values that we claim to espouse. The consumption patterns of individual Canadians, the environmental practices of the companies that we own, manage and work for, and the policy choices of the politicians that we elect suggest that we are often unwilling to 'walk the talk' on environmental issues.

Some of this disconnect might be explained by the structural obstacles described by Boyd – the logic of collective action and our mechanisms for social choice clearly work against solutions to some environmental problems. Canadians may also simply be lying to pollsters when asked to rank environmental issues on their hierarchy of concerns. Boyd notes that support for environmental protection is sometimes dismissed as being as 'a mile wide and an inch deep'. Finally, we may be ignorant about the trade-offs that we will have to confront and the opportunities for achieving a more sustainable future.

If the latter explanation has some validity, it is another reason why *Unnatural Law* has a critically important place on the bookshelves of the nation. However, one suspects that the gap between Canadians' rhetoric on the environment and the reality that they create through individual and collective choice will continue to present a challenge, even if *Unnatural Law* does become a national bestseller. Developing a strategy to close that gap is an important part of the agenda for sustainability.

Finally, Boyd's prescription for change does not include a possible third track for 'rethinking' Canadian environmental law and policy. Boyd's first track fits largely within the existing paradigm – examining the legal and policy regimes for water, air, land and biodiversity and then proposing a series of important yet largely incremental improvements designed to, among other things, strengthen requirements, fill gaps, increase accountability, and facilitate public involvement. His second track is to step outside of the current paradigm by focusing directly on 'root causes'. A third track would explore options for transforming the existing

paradigm through fundamental changes to legal and institutional architecture.

Canada's poor record on many environmental issues can be attributed in part to the jurisdictional divisions, sectoral fragmentation and unplanned incrementalism that are built into our legal, regulatory and policy regimes for resource and environmental management. Forestry operations, energy development, agriculture, transportation infrastructure and outdoor recreation often share the same land base, but are managed independently. Water, air, wildlife, fish and forests are often treated as separate entities in law and policy. Decision-making on the disposition and development of natural resources on our public lands occurs in an incremental fashion, often without reference to total cumulative impacts over time and space. The entire ramshackle structure that determines the future of our landscapes lacks an ecological bottom line and a unifying legal or policy framework.

The result is that Canadians live the 'tragedy of the commons' on a daily basis – and this tragedy is not confined to the Atlantic cod fishery. Our ecological footprint is largely shaped by unintended consequences and cumulative environmental effects.

Boyd hints at these problems, noting at one point that resource extraction "accounts for a substantial proportion of the environmental damage in Canada." He also comments that American environmental law has been criticized for being "highly fragmented, taking a scientifically outdated pollutant-by-pollutant, medium-by-medium, species-by-species approach." *Unnatural Law* does not, however, deal at any length with the overall structure of decision-making that has contributed to our consistent failure to set and achieve landscape-level objectives over ecologically meaningful time and space.

This perspective suggests an opportunity to apply Boyd's analytical template and identify a third 'ethic' – in addition to his consumption and population ethics – to guide us down the path to sustainability. While Aldo Leopold appears in Boyd's reference list, *Unnatural Law* does not explore the potential for developing a 'land ethic' to redefine our relationship with nature and reconfigure Canadian environmental law and policy. This ethical imperative could provide an ecological foundation for land and resource management in Canada. It could also help to bridge the gap between the incremental enhancement of our existing legal and policy regime that is necessary, but not sufficient, and the fundamental restructuring of our economy that must occur if we are to reduce our ecological footprint.

Just as Boyd has sketched out the practical ramifications of his consumption and population ethics, specific steps can be identified to implement a 'land ethic'. For a start, we need to transform the current patchwork of environmental law and policy into an integrated framework for managing human activities on the landscape according to explicit ecological, social and economic objectives. The logic of integration should then be applied to each decision-making process along the continuum from broad land-use policy and planning to project-specific regulation and eventual reclamation.





The literature on ecosystem-based management, integrated resource management and cumulative effects assessment has begun to define an agenda for this type of legal, institutional and policy change. Progress on this track could usefully complement the numerous improvements to existing legal and policy instruments that Boyd proposes. Incorporating a land ethic into Canadian environmental law and policy would also begin to shift the parameters for decision-making on land and resource use, thereby laying the groundwork for the more far-reaching attack on the root causes of environmental degradation that Boyd so persuasively advocates.

Comprehensive coverage of all issues and perspectives is not, of course, a realistic objective for any book on environmental law and policy. The strength of *Unnatural Law* is that it comes remarkably close to achieving the unachievable, covering much of the field in a balanced and thoughtful way. Boyd describes the current state of Canadian environmental law and policy, accurately explains the principal obstacles to progress, and provides us with the broad vision and many of the specific prescriptions that we need to move forward. Perhaps just as important, Boyd gives us reason to hope.

Unnatural Law sets a new standard for the analysis of Canadian environmental law and policy. It is essential reading for anyone who wants to understand where we are on the path to sustainability, where we should be going, and how to get from here to there.

♦♦ *Unnatural Law: Rethinking Canadian Environmental Law and Policy* by David R. Boyd was published in September 2003 by UBC Press. It is available in paperback (ISBN 0-7748-1049-1 –\$29.95) and hard cover (ISBN 0-7748-1048-3 – \$85.00). For information on the book, see: www.unnaturallaw.com.

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RECENT DEVELOPMENTS IN OIL AND GAS LAW

Nigel Bankes♦♦♦

Shallow rights owner trespasses on deep rights

In *Xerex Exploration Ltd. v. Petro Canada*, [2003] A.B.Q.B. 746, the facts were that PC held the shallow rights under a Crown lease and Xerex held the deep rights under the terms of a Crown licence due to expire December 3, 1996. PC began drilling a well in November 1996. Its EUB well licence indicated that the well was not to be drilled more than 15 metres below the base of the shallow rights and that drill cutting samples should be taken at 5-metre intervals from 30 metres above the base of the shallow rights to total depth. On November 20, PC suspended the well within this approved area having identified the presence of oil shows or stains. PC then contacted Xerex. PC sought to acquire Xerex's interest but did not disclose that it had already drilled into the deep rights. Xerex refused to sell its interest outright but subsequently sold its interest to PC in return for a 3% gross overriding royalty. Following the conversation with Xerex, but before any written agreement was in place, PC resumed drilling, deepening the well and taking additional samples. The well was subsequently completed as a producer. PC sold this property and others to Progress Energy, free of the royalty interest. Xerex sought to set aside the transfer, or, in the alternative, obtain damages on the basis of trespass or conversion, actual misrepresentation, or the failure to disclose information in circumstances where there was a duty to disclose.

Justice LoVecchio held that Xerex, as the holder of a Crown licence which accorded "the exclusive right to drill for, win, work and recover" the licence substances, and which was in law a *profit à prendre*, was entitled to maintain an action in trespass. In initially drilling below the base of the shallow rights, PC was acting on the authorization of the EUB licence and accordingly did not commit trespass. Furthermore, the drilling did not become trespassory simply because PC took samples at one metre intervals rather than at the 5-metre intervals as required by the EUB. However, in resuming drilling after having been in contact with Xerex, and then taking additional samples, PC did commit a trespass. It was unreasonable to conclude that PC drilled ahead on the basis of a verbal assurance that there was a verbal deal to acquire Xerex's rights. These activities also constituted conversion insofar as PC engaged in an unauthorized assumption and exercise of the rights of ownership over goods or personal chattels belonging to another to the alteration of their condition or the exclusion of the owner's rights.

Xerex was not able to establish an actionable misrepresentation that induced Xerex to enter into the transfer and royalty arrangement since the evidence did not go that far. All that the evidence established was that PC's representative responded in the negative when asked by Xerex if PC had "already drilled into this". While it was true that PC was already below the base of the shallow rights, it was still within the authorization conferred by the EUB licence. One possible interpretation





was that the question and the answer were concerned with whether or not PC had already exceeded its drilling rights.

However, PC's conduct did constitute an actionable misrepresentation insofar as it failed to disclose the fact that at the time that it approached Xerex it had already discovered oil showings in the formations below the shallow rights. While in general there is no positive duty of disclosure in contractual negotiations between arm's length parties, here, the duty to disclose arose from the fact that having represented that PC was then engaged in drilling, PC was then under a duty to ensure that the information given was not only accurate but complete.

Xerex was not entitled to rescission of the transfer on the grounds of misrepresentation since the property had since been transferred to a third party (Progress) but it was entitled to damages. The damages award should not be nominal notwithstanding the fact that Xerex's licence was about to expire and notwithstanding that it was unlikely that Xerex would have even contemplated drilling the necessary well to obtain continuation of the licence. Damages should be calculated on the basis of the type of deal that Xerex would have been able to negotiate had it known of the oil showings rather than on the basis that Xerex would have drilled its own well. While the evidence confirmed that Xerex had sufficient time in which to do its own drilling, the record suggested that this was unlikely. While the terms of any more favourable deal were somewhat speculative, it was reasonable to think that Xerex would have bargained for a 50% interest in the well rather than the GOR. Xerex was entitled to damages calculated on the present value of the projected net revenues from the well on this basis. It followed from this that Xerex's royalty interest should be cancelled and that since PC was liable to Xerex, Progress got what it bargained for with PC (the property free of the GOR) and was therefore not entitled to any indemnity from PC.

The judgement is not free of difficulty. I shall mention three concerns. First, and with respect to the tortious allegations of conversion and trespass, the elements of the cause of action in trespass are entering onto the land of another without lawful justification; i.e., trespass is *prima facie* an interference with possession or possessory rights. In this case, LoVecchio seems to suggest that trespass is only committed when PC actually removed Xerex's licensed substances. Perhaps more significant however is the suggestion that the EUB licence could erase the trespass insofar as PC was acting within its authorization. This is a novel proposition. B still commits trespass if she enters onto C's land without C's permission even if she has D's permission. D cannot erase the trespass unless D happens to be C's agent, or unless the licence amounts to some sort of statutory authorization. It is not clear that we can read an EUB well licence as providing a statutory authorization for a trespass and certainly one cannot read either section 18 of the *Oil and Gas Conservation Act* or subsections 58 and 59 of the *Mines and Minerals Act* as authorizing what would otherwise be a trespass to the deep rights.

While it is true that Vaughan CJ in *Thomas v. Sorrel* defined a licence as the permission to do something that otherwise would be a trespass, calling something a licence (the authorization to drill a well), does not

make it a licence. Perhaps the only way of supporting LoVecchio's judgement on this point is to infer Xerex's implied authorization on the basis (if indeed true) that it is well known in the industry and accepted practice for a party to over drill a formation in order adequately to test that formation. But it is less than clear that evidence of custom would actually support such an argument.

LoVecchio's comments on conversion seem equally problematic. The gravamen of conversion is interference with title to personal property. But where is the personal property in this case and who owns it? LoVecchio seems to suggest that PC committed conversion by appropriating Xerex's oil. But the oil never was Xerex's property (as LoVecchio acknowledges when he accepts that the Crown owned the oil *in situ*), and PC never converted Xerex's licence (i.e., the paper document evidencing Xerex's rights.) And in any event, by the time that PC is actually producing oil from the deep rights it has a title to do so.

Second, I think that the court's finding of an actionable misrepresentation based upon PC's failure to disclose that it had already made a discovery is highly problematic. Recall that LoVecchio's premise at this point is that PC's drilling and testing was not yet trespassory. Where does the duty to disclose proprietary information come from? While one can accept that silence may distort a positive representation and that a representor may have a *With v. O'Flanagan*, [1936] Ch. 575 duty to correct a representation that, while true when made, becomes a misrepresentation before negotiations are concluded and the contract is finalized. But that was not this case. In my view the present case seems more like *Holt Renfrew v. Singer*, [1982] 4 W.W.R. 481 (Alta. C.A.) where the majority of the Court of Appeal found in that case that the representor had (in Kerans' phraseology at 516) "no words to eat".

Third, what about the calculation of damages? If one accepts the premises of an actionable misrepresentation and the non-availability of rescission, it does seem reasonable to calculate damages on the basis of the deal that would have been negotiated had there been full disclosure. But that said, we should ask what sort of farmout Xerex would have negotiated. It seems reasonable to think that the well would have been for the sole cost, risk, and expense of PC and that Xerex would have got an override convertible following payout. I think that LoVecchio's award is worth significantly less. What LoVecchio seems to have said is that the well should be a shared expense (there are several references to Xerex's entitlement being an entitlement to net revenues) and that it was either/or (i.e., a royalty or a working interest) and not both. This latter point seems to ignore the common practice of according a royalty pending payout, at which time the royalty holder might elect to convert. This line of reasoning would have provided a more convincing rationale for LoVecchio's decision to terminate the GOR. As written, it is not clear where LoVecchio gets this authority from. The parties seem to admit in this case the GOR is an interest in land that binds Progress Energy. If so, how does it just disappear? The court did not discuss how damages would have been calculated on the basis of the tortious causes of action in trespass and conversion. This is hardly surprising for it seems clear that Xerex would have faced more difficulty claiming substantial damages on either ground; consider, for example, that both





the trespass and the conversion (if any) cease when PC acquires the title.

Finally, LoVecchio's judgement is written in a no-nonsense style that is remarkably free of the recitation of authority. While some will find this attractive, it does limit the value of the judgement as authority. For example, while LoVecchio, in my opinion correctly, characterizes Xerex's Crown licence as a *profit* (because it provides the authority to win, work and remove the licensed substances) he fails to cite any authority for that proposition or to recognize that he is differing on this point from Justice Virtue's judgement in *Vandergrift v. Coseka Resources Ltd.* (1989), 67 Alta. L.R. (2d) 17 (Q.B.).

Wildcatters: the judgement on remedies

In *Resources* #80, I commented on the decision of the Saskatchewan Court of Queen's Bench and Court of Appeal in *Montreal Trust Co. v. Williston Wildcatters*, [2001] S.K.Q.B. 360, aff'd [2002] S.K.C.A. 91, [2002] 10 W.W.R. 633. It will be recalled that in that decision the Court found that the TDL lease on which Wildcatters was operating and producing had terminated during its secondary term. Estoppel arguments failed to revive the lease. The parties had agreed to sever the issue of appropriate remedies and we now have that decision [2003] S.K.Q.B. 360.

Chief Justice Gerein held that damages should be calculated on the basis that TDL's continued operation of the well after termination of the lease on January 3, 1990 was trespassory, as was Wildcatters' drilling of the second well on the lands. These activities did not cease to be trespassory by virtue of the doctrine of leave and licence. The doctrine of leave and licence did not apply here since, at the outset, in the period immediately following expiry, the plaintiff lacked knowledge of its legal rights. While the plaintiff raised the question of the validity of the lease by way of a letter in March 1992 and did not subsequently instruct the operator to vacate the lands, this was explainable by the uncertainty as to whether or not the lease was still in force and should not be construed as affording leave and licence. The action was commenced on February 26 1993 some 11 months after the initial letter and this was the relevant time to apply the doctrine of leave and licence. The trespass did not terminate until, following judgement on September 6, 2001, there was an arrangement for the defendants' continuing possession set forth in a consent order of the court. The defendants' retention and sale of production from the lands following termination was also a conversion and the plaintiffs were entitled to an accounting for that production.

Gerein held that damages should be awarded on the basis of the type of arrangement that the parties would have negotiated had they entered into a new lease for the property and not on the basis of gross production revenues with no allowance for the costs of severance and production. The latter method was inappropriate since there was no evidence that the trespass was wilful or fraudulent. There was some evidence to suggest that the plaintiffs would have been prepared to execute a new lease for a bonus payment of \$4 per acre and a gross

royalty of 18% and accordingly damages were assessed on this basis.

Since only TDL was involved in the 12-8 well it was solely responsibility for payment of damages attributable to that well whereas the liability for the 11-8 well was a joint and several liability of all of the parties interested in the well. One of the parties, Long Rider, was not joined to the action until 1997 and was therefore entitled to plead a limitations defence to any wrongful act committed prior to July 15, 1991. The parties other than TDL were entitled to recover their share of any damages (including interest) from TDL because of TDL's breach of warranty under the terms of the farmout agreement. However, these defendant were still obliged to make GOR payments to TDL under the terms of the farmout agreement.

It was inappropriate to grant the plaintiffs a declaration that it is the owner of the wellbore, downhole and surface equipment for the 11-8 well in the absence of all of the relevant facts. Since the lease was terminated the registrar should be directed to discharge the caveat protecting the lease.

Leave to appeal granted in phase severance decision

I discussed the important *Amoco v. Anderson* decision at both trial [1999] 3 W.W.R. 255, *Resources* #64, Fall 1998, and in the Court of Appeal, [2002] A.B.C.A. 162, [2003] 1 W.W.R. 174, *Resources* #78, Spring 2002. The Supreme Court of Canada September 4, 2003, has granted leave to appeal.

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