May 18, 2011

Compensation for cancelled oil sands rights under the terms of the draft Lower Athabasca Regional Plan

By Nigel Bankes

Document commented on:

Draft Lower Athabasca Regional Plan 2011 - 2021, Strategic Plan and Implementation Plan; Proposed Lower Athabasca Integrated Regional Plan Regulations

In an earlier blog on a draft version of the Lower Athabasca Regional Plan (LARP) under the *Alberta Land Stewardship Act*, SA 2009, c.A-26.8 (*ALSA)* I suggested that I might provide a further blog on the implications of the Plan (if implemented) for existing property interests. This is that blog but with a focus on oil sands rights that will be cancelled if the Plan is implemented as proposed. The Draft LARP also addresses other Crown resource interests that might be affected including timber harvesting interests.

This blog has four sections. The first section examines what the two documents have to say about existing property interests and the proposed cancellation of oil sands rights. The second section examines what the two relevant statutes (and regulations) (*ALSA*, the *Mines and Minerals Act*, RSA 2000, c. M- 17 (*MMA*) and the *Mineral Rights Compensation Regulation*, (*MRCR*) Alta. Reg. 317/2003) have to say about the issue, the third part offers some analysis and the fourth and final section asks whether the recently proclaimed amendments to *ALSA* (Bill 10) will make any difference.

The treatment of existing property interests under the Draft Plan and Regulations

In general, and consistent with Bill 10, the Draft Plan signals from the outset that it does not intend to affect property rights in relation to freehold lands (at 2 – 3):

> Private landowners make decisions about how to use and manage their land consistent with existing provincial and municipal legislation. The LARP does not change this or alter private property rights.
>
> The LARP … does not rescind land title or freehold mineral rights. Any decisions that may affect private landowners will occur through existing legislation and processes, and private landowners remain entitled to due process and compensation under those laws.

The Draft Plan also signals that existing oil and gas rights will be honoured (at 19).

As for the future, the Plan indicates that the Crown may still grant oil and gas rights within protected areas but that such rights will have to be exploited from outside the boundaries of the protected area (at 19).

But different rules will apply to Crown granted oil sands interests that are included within newly created protected areas. In most cases developments for oil sands, and metallic and industrial minerals and coal will no longer be permitted and as a result any existing interests will be cancelled. The Draft does propose some exceptions, thus oil sands, and metallic and industrial minerals and coal will continue to be permitted uses in some natural areas (eg Garner Orchid Fen) and Stony Mountain Wildland Provincial Park -- which seems more than a little strange (see tables at 44 – 48).

The Draft Plan indicates (at 19) that:

> Tenures subject to cancellation as a result of the Lower Athabasca Regional Plan will be compensated in accordance with existing legislation, specifically, the *Mines and Minerals Act*, the Mineral Rights Compensation Regulation and the *Forests Act*. The intent of this legislation is to return affected companies to the position they were in prior to obtaining the cancelled tenure.

This statement of policy is carried forward into the Draft Regulations. To take but one example, Schedule 1 to the regulations refers to the Canadian Shield Wildland Park and provides that upon LARP coming into force "the following statutory consents will be rescinded to the extent of the lands under the statutory consent that are within the park" and the Schedule then goes on to list in a *pro forma* way Oil Sands Agreement No. XYZ and Metallic and Industrial Minerals Agreement No. ABC.

Here is what the Wildrose Alliance had to say about the implications of the Plan:

> For the second time [the first was the royalty review, a development that this blogger welcomed here] during Ed Stelmach's tenure as Premier, the Progressive Conservative government has launched a devastating assault on the Alberta economy with a proposal to extinguish 20% of oil sands development in the Athabasca region.
>
> The proposals, which would cancel leases for some two dozen oil, gas and mining operations, were released yesterday as part of the draft Lower Athabasca Regional Plan (LARP) – the first of seven such regional planning areas enacted by the authoritarian (*sic*) Bill 36.

The right to compensation under the relevant statutes

Section 11 of *ALSA* contemplates that a plan may "affect, amend or extinguish" a statutory consent. Persons so affected must be given reasonable notice and must have the opportunity to show how the objectives of the plan can be achieved without impairing the statutory consent. The term statutory consent is broadly defined:

> "statutory consent" means a permit, licence, registration, approval, authorization, disposition, certificate, allocation, agreement or instrument issued under or

> authorized by an enactment or regulatory instrument; [note this definition is revised by Bill 10 – see below]

There is little doubt but that this term includes an oil sands disposition under the terms of the *Mines and Minerals Act* and the *Oil Sands Tenure Regulation*.

Section 9(2)(h) of *ALSA* provides that a Plan may authorize expropriation under the *Expropriation Act* but the Plan does not trigger this section or that *Act*. Instead, as noted above, the Plan contemplates compensation under the *MRCR*. Since the Draft Plan does not refer to the creation of conservation directives (ss. 36 – 43) the only other relevant section is s.19 which states the general rule to the effect that "No person has a right to compensation by reason of this Act, a regulation under this Act, a regional plan or anything done in or under a regional plan", except in the case of: (1) conservation directives (not relevant here), or (2) "as provided under another enactment".

And the reference to "another enactment" takes us to the *MMA* and the *MRCR*.

There are two sections of the *MMA* that deal with expropriation of or cancellation of Crown mineral interests in return for compensation. First s. 8(1) provides that:

> The Minister may
>
> (b) acquire by expropriation any estate or interest in minerals, if the Minister is of the opinion that any or any further exploration for or development of those minerals is not in the public interest;
>
> (c) accept the surrender of, cancel or refuse to renew an agreement as to all or part of a location when the Minister is of the opinion that any or any further exploration for or development of the mineral to which the agreement relates within that location or part of it is not in the public interest, subject to the payment of compensation determined in accordance with the regulations for the lessee's interest under the agreement;

Paragraph (b) speaks to non-Crown mineral interests and paragraph (c) to Crown mineral interests and it is therefore this paragraph that is relevant here.

Second, s.24 provides that the Minister may cancel an agreement in return for compensation in the case of a misdescription of a zone. Evidently we are concerned here with s.8 and not s.24.

The *MRCR* lays out the terms on which the Crown will compensate a mineral owner for a cancelled interest. The regulations are complex but for present purposes it is perhaps adequate to say that the regulations compensate the owner of a Crown mineral interest on the basis of monies spent rather than the value that might be placed on the Crown mineral rights in a market transaction between a willing seller and a willing buyer. The elements of compensation include compensation for the acquisition and maintenance costs of the interest (bonus payment and rental), a development allowance (monies expended in exploring for or developing minerals in the location), a reclamation allowance, and an interest allowance.

Analysis

I think that the principal questions that we need to ask are these: (1) can the government lawfully cancel oil sands agreements on the basis of monies spent rather than market value, and (2) if it is lawful, is it unfair or unethical to compensate on this basis rather than on the basis of market value? I assume for present purposes that market value will be higher than a cost based valuation but I also recognize that this will not always be the case – much will depend on the world price of oil at the time of valuation. At the time of writing it happens to relatively high (around $100 a barrel).

Is it lawful?

There is no constitutional protection for property rights in Canada and there is no general statutory duty to compensate in the event of a lawful taking or cancellation. There may be an implied right to compensation (see *British Columbia v Tener*, [1985] 1 SCR 533) unless a statute provides to the contrary, but if a statute and relevant regulations (as here in the *MMA* and the *MRCR*) provide a scheme for compensation then a court will look to the statutory compensation scheme rather than any implied common law entitlement – even if the common law might provide a more generous standard of compensation than that provided by the statute.

This is the general position and it is the position that will prevail against a Canadian investor. There is a further question as to whether a foreign investor protected either by NAFTA or a bilateral investment treaty (BIT) might be in a stronger position to claim market based compensation (although from Canada, not Alberta) either on the basis that cancellation is an expropriation (or a measure tantamount to an expropriation) within the meaning of NAFTA or a BIT, or a breach of the fair and equitable treatment standard. I don't think that this argument would prevail but it would not surprise me if some foreign investors try and make something of this argument.

Is it ethical?

I think that the crucial question here is whether or not a party investing in the oil sands can claim that they have been ambushed by the proposed cancellation of oil sands rights on terms that provide for compensation on a cost basis rather than a market value basis. I do not believe that any oil sands agreement holder can make that claim with any credibility for at least two reasons. First, all persons who acquire Crown oil and gas or oil sands rights acquire them on terms (written into their agreements) which make it crystal clear that the agreements are held in accordance with the *MMA* and its regulations and other laws of the province. This compliance with laws clause is a rolling definition of the laws of Alberta as they exist from time to time but in this case the province does not need to rely on the evolutionary nature of the incorporation of laws and standards since the current regulations have been in place with much the same content since 2003. Furthermore, as I recall it, the previous regulations which were put in place in 1978 also followed a cost-based approach to compensation. Second, there has been much debate for many years as to the need to put in place an appropriate network of protected areas in the Athabasca area. The Cumulative Effects Management Association (CEMA) itself, an industry sponsored organization, recognized this need and recognized as well that the scale of the areas required to be established as protected areas would mean that some existing oil sands interests would be prejudiced. CEMA recommended "An expanded permanently Protected Zone where industrial activities are excluded comprising 20% to 40%" of the Rural Municipality of Wood Buffalo": see Terrestrial Ecosystems Management Framework.

In sum, those bidding on Crown oil sands leases knew that there was some risk and they knew the nature of the risk – the creation of new protected areas to protect ecological values; they knew that the government had the power to cancel agreements in the public interest and they knew the scale of the compensation that would be offered. Taken together these two reasons suggest that cancellation on the proposed terms is not unethical or unfair. These arguments also suggest that the government action will not be in breach of the fair and equitable treatment standard -- either as narrowly construed under NAFTA, or as broadly construed under other BITs or FIPAs (foreign investment protection agreements).

The Implications of Bill 10

Bill 10 which was given royal assent on May 13, 2011 proposed certain amendments to *ALSA*. I have commented on Bill 10 here.

Does Bill 10 change any of the responses to the above? I think that the answer is "no". Bill 10 was already introduced when the LARP material was released and accordingly some of the drafting was premised on the passage and entry into force of Bill 10. Indeed, the Schedules to the draft regulations which deal with the treatment of resource agreements within protected areas (see reference to Schedule 1 and the Canadian Shield Wildland Park above) contain a footnote to the "rescinding" of the listed statutory consents noting that "This assumes Bill 10 receives royal assent before the regional plan is passed."

In particular, agreements under the *MMA* continue to be statutory consents notwithstanding the clarification of the definition of that term offered in Bill 10; and the new s.19.1 – whether or not it expands the right to compensation – applies only to registered owners (persons with a registered estate in fee simple) and not to persons holding Crown agreements under the *MMA*.