CHANGES TO THE LICENSEE LIABILITY RATING PROGRAM

LLR Program Changes
Ripple Effects of LLR Changes on Small E&P Companies

The Business Efficacy of Licences
Government’s Responsibility for Duty to Consult

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ON MARCH 12, 2013, THE AER RELEASED BULLETIN 2013-09 ANNOUNCING SIGNIFICANT CHANGES TO THE LICENSEE LIABILITY RATING (LLR) PROGRAM. These changes are being implemented in three phases, the first and second of which became effective on May 1, 2013 and May 1, 2014, respectively.

In light of the current price environment, the implementation of the third (and final) phase was delayed from May 1, 2015 to August 1, 2015, granting licensees more time to understand the implications of, and prepare for, the third phase of changes. Overall, the changes to the LLR Program have resulted in an increase in the
value of security licensees must post under the LLR Program. To satisfy security deposit requirements, the AER accepts renewable, irrevocable letters of credit and certain negotiable financial instruments, including cheques, money orders, bank drafts or cash, or in other words, cold, hard cash from the licensee. For licensees with a Liability Management Rating (“LMR”) of less than 1.0, who have already been negatively impacted by the drop in oil prices, the requirement to post this security has a compounding effect on their financial challenges. Furthermore, a strong argument can be made that small operators are now bearing a disproportionate share of responsibility for Alberta’s orphan well fund.

The LLR Program

Every month, the LLR Program calculates each licensee’s Liability Management Rating (“LMR”). The LMR is a ratio of a licensee’s deemed assets in the LLR Program, Large Facility Liability Management Program and Oilfield Waste Liability Program, divided by its deemed liabilities. The LMR calculation parameters are detailed in Directive 006. In brief, the value of the deemed assets is calculated by multiplying a licensee’s production from the previous year by a rolling industry netback. The value of the deemed liabilities is based on the AER established costs to “suspend, abandon, remediate and reclaim” all of a licensee’s wells and facilities. Every licensee is required to maintain a monthly LMR of 1.0 or greater, failing which a security deposit must be paid to the AER. Given the speed and degree of the recent declines in energy prices, the rolling industry netback is inflated, which has a mitigating effect on a licensee’s LMR. However, with the industry average netback now being calculated on a 3 year average (as further discussed below), the rolling industry netback is not as inflated in comparison to such calculation being based on a 5 year average.

The changes to the LLR Program modified the formula used to estimate future abandonment and reclamation costs in order to address concerns that the old regime significantly underestimated the environmental liabilities of licensees.

The Changes to the LLR Program
The first and second phase of the changes to the LLR Program were as follows:
- the industry average netback was decreased from a 5 year to a 3 year average;

- deemed well abandonment liabilities were increased by one-third of the 2012 values in 2013 and 2014;

- deemed assets were increased by one-third of the 2012 industry average netback in 2013 and 2014;

- the reclamation costs for each individual well or facility was increased by 25% and facility abandonment cost parameters were increased by $7,000 for each well equivalent (both of which increased a licensee’s deemed liabilities);

- the Present Value and Salvage (PVS) factor increased from 0.75 for active wells and 0.50 for active facilities to 1.0 for all active wells and facilities (which also has increased a licensee’s deemed liabilities as total site liability is multiplied by the PVS factor to determine the final liability); and

- calculation of the 2014 orphan levy based on the 2013 LLR Program changes.

In the third phase, the deemed well abandonment liabilities and deemed assets increased an additional one-third bringing them to double their 2012 values. In addition, the calculation of the 2015 and 2016 orphan levy are based on the 2014 LLR Program changes and the 2015 LLR Program changes, respectively. After 2016, the orphan levy will be calculated in accordance with Directive 011.

Impact of the Changes to the LLR Program

As a result of the changes to the LMR formula, there has generally been a significant increase in the security deposits payable to the AER by licensees with an LMR of less than 1.0. Despite the phased-in implementation of the LLR Program changes, many licensees have struggled to pay the increased security deposits. This struggle has been exacerbated by the recent global decline in energy prices. As wells become uneconomic to produce, licensees may choose to shut in wells rather than produce at a loss. Low energy prices have also caused licensees to defer or cancel drilling activity. While such decisions to shut in wells and reduce drilling activity are economically sound, they result in a drop in production volumes, thereby causing a decline in a licensee’s deemed assets. Unless a licensee can offset the decline in its deemed assets with a proportionate reduction in its deemed liabilities, the licensee’s LMR worsens and the required security deposit grows. If a licensee fails to post the required security, the AER may issue closure orders, which may drastically affect the ability of the licensee to improve its financial situation.
The increase in the security deposit payable to the AER has also intensified the issues relating to the transfer of well licenses, particularly for licensees with an LMR of less than 1.0. Before the transfer of a license is approved, the AER requires that the transferor and transferee each have a post-transfer LMR of at least 1.0. Any party with an LMR of less than 1.0 will be required to post security. Therefore, if a seller seeks to transfer more deemed assets than deemed liabilities, the seller will need to ensure that the sale price is sufficient to cover the required security deposit. In the buyer’s case, if it is purchasing assets that carry an LMR ratio of less than 1.0, it will either need to have enough cushion in its deemed assets to absorb this negative impact and emerge with a post-transfer LMR of at least 1.0 or alternatively, pay the required deposit to the AER. This can limit the pool of potential buyers, reduce the purchase price that the buyer is willing to pay and in cases where the seller has significant deemed liabilities, hinder or prevent the operating assets from being transferred.

In order to mitigate the financial hardships caused by the increased LMR burdens on licensees, the AER introduced the LLR Program Management Plan (the “Management Plan”) on February 28, 2014. The Management Plan allows licensees to pay the security deposit they owe in installments and over a longer period of time. To be approved for the Management Plan, the licensee must, among other things, provide to the AER an operating forecast, which includes the licensee’s reserve information, net revenues and abandonment and reclamation requirements. Once accepted into the Management Plan, there are certain conditions that the licensee must meet, such as: (1) conducting abandonment and reclamation work in accordance with the operating forecast; (2) monitoring and demonstrating improvement in its LMR ratio; and (3) providing the AER with monthly reports on the progress it has made with respect to its operating forecast. While the Management Program provides licensees with an LMR of less than 1.0 an extension in the timeline for payment of the security deposit, participants in the Management Plan expose themselves to greater scrutiny by the AER and must ultimately still pay the full deposit. As of July 20, 2015, there are only 29 licensees approved to use the Management Plan.

Additional Reflections on the Impact of the Changes to the LLR Program
The ultimate goal of the LLR Program changes is to prevent Alberta taxpayers from being responsible for the costs of suspending, abandoning, remediating and reclaiming a well, facility or pipeline. Unfortunately, these changes have disproportionately imposed the requirement to post a security deposit on the industry’s smallest producers. According to the AER’s monthly LMR Report dated August 1, 2015, 351 of the 811 licensees have an LMR of less than 1.0 (approximately 43%). The August LMR Report further provides that the total deemed liabilities for the licensees with a LMR of less than 1.0 is approximately $640,872,962.04, while the total deemed liabilities for all licensees are estimated at $36,075,647,838.90. These statistics suggest that the 43% of licensees with an LMR of less than 1.0 account for only 2% of the total deemed liabilities for all licensees.

To put matters further into perspective, the total LMR security deposits held by the AER as of July, 2015 is $177,591,234.58; however, the AER estimated that it would hold $297 million in security deposits by May, 2015. In other words, the AER is expecting to hold sufficient deposits to cover approximately 50% of the deemed liabilities of licensees with an LMR of less than 1.0. This seems to indicate that the industry’s smallest producers are being required to immediately fund half of their eventual abandonment obligations. At the same time, there are more than 80,000 inactive wells in Alberta that do not require deposits because the licensee has a LMR greater than 1.0. These licensees must still comply with AER Bulletin 2014-19 which requires that each licensee bring 20% of its inactive wells into compliance every year. However, the cash outlay required to bring 20% of inactive wells into compliance pales in comparison to the requirement for licensees with LMR challenges to immediately fund half of their entire abandonment liability.

While we appreciate the challenges of $40/bbl oil (or less) and the consequential ever-growing number of inactive and orphan wells in the province pose for the AER, the current regulatory environment paralyzes small operators operationally and financially, and requires them to bear a disproportionate share of responsibility for the oil and gas industry’s abandonment and reclamation liabilities. Ultimately, the increase in the LMR security deposits does not adequately address the ever-growing number of inactive and abandoned wells in Alberta and thus, much more will need to be done to tackle this problem.
THE EDUCATION COMMITTEE IS CONTINUALLY LOOKING TO OFFER OUR MEMBERS NEW OPPORTUNITIES to enhance their skills in the ever changing environment we work in.

The CAPL is very proud to present and host new educational courses in its new classrooms. Thanks to the tireless work of the education committee volunteers, we added five new courses in 2015 for the membership. Earlier in the year we offered three new courses: “Energy Risk Management Practices – The View from the Trenches”, ”Petroleum Evaluations – Making the Right Decision” and “Fundamentals of Mineral Land.”

With only two months remaining in 2015 we have two new and exciting courses yet to come.

The first is a two day technical seminar on November 4 and 5 entitled “Evaluation of Canadian Oil and Gas Properties for Landmen,” being taught by Sproule Academy. This course is designed to offer our members with an opportunity to take an engineering evaluations course customised for our specific professional discipline. This seminar is ideally suited for Landmen working specifically in the evaluation of mergers, acquisitions or dispositions of assets. We are working closely with Sproule Academy to offer additional technical seminars in 2016.

The second is a two day business skills seminar on November 18 & 19, entitled “Enhancing Strategic Perspective,” being taught by Knightsbridge Human Capital. Enhancing Strategic Perspective is about stretching to think beyond today and to build for the future. The program encourages each professional to recognize how their daily decisions and interactions have a broader impact on themselves, their teams, their peers and their organizations as a whole. Participants use a simple, yet powerful model to identify the strategic opportunities and how to be seen as being strategic. They leave the program with practical tools and powerful insights, driven through critical thinking and discussion and the building blocks for sustaining connections that position them and their organizations for success.

The Education Committee is already working to set the 2016 course calendar and designing new content, including a British Columbia continuation course and much more. We look forward to seeing many of you at our new educational space engaging in personal and professional development opportunities.

Connie De Ciancio
Co-Chair. Education Committee

New Look = New Learning Opportunities
Provincial Environmental Appeal Boards

A Forum of Choice for Environmental and First Nation Plaintiffs?


IN THIS IMPORTANT (AND LENGTHY) DECISION (115PP), BRITISH COLUMBIA’S ENVIRONMENTAL APPEAL BOARD (EAB) REVOKED NEXEN’S COMMERCIAL WATER LICENCE FOR TWO REASONS. First, the terms and conditions of Nexen’s licence were not technically supportable. Secondly the Crown was in breach of its constitutional obligation to consult the First Nation, with respect to the decision to issue the water licence.

I think that the decision is important for at least four reasons (notwithstanding the fact that the days...
for the version of the Water Act, RSBC 1996, c 483 in force at the time of this licence decision are numbered, since it is due to be replaced by the new BC Water Sustainability Act in early 2016 [for comment see http://ablawa.ca/2014/05/28/british-columbias-water-sustainability-act-a-new-approach-to-adaptive-management-and-no-compensation-regulation/]. First, and most generally, it is an excellent example of the important role that environmental appeal boards can play in shining a light on the administrative practices of line departments. In the same vein, it is also offers a dramatic illustration of the differences between the role of an EAB and the role of a court, on a judicial review or statutory appeal application. An EAB can offer a searching, de novo, technical re-assessment of the merits of the department’s decision; a court is inevitably more deferential and precluded from engaging in an assessment of the merits. I have written at length on this important role that EABs serve, see “Shining a Light on the Management of water resources: the role of an Environmental Appeal Board” (2006), 16 Journal of Environmental Law and Practice, 131 – 185.

Second, the EAB offers some important and useful observations on the Water Act and the role of the EAB and also on the role of both precaution and caution.

Third, the Board’s discussion of the duty to consult in a treaty context is detailed and well-reasoned and an interesting example of Board (rather than a court) assessment of the (non)satisfaction of the duty to consult: see Rio Tinto Alcan Inc v Carrier Sekani Tribal Council, [2010] 2 SCR 650 and my post on that decision, http://ablawa.ca/2010/11/02/the-supreme-court-of-canada-clarifies-the-role-of-administrative-tribunals-in-discharging-the-duty-to-consult/).

Fourth, the remedy is significant since the outcome of a successful breach of a duty to consult case is rarely a decision to quash: see, for example Haida Nation v British Columbia (Minister of Forests), [2004] 3 SCR 511. The remedy was especially significant here since the licence authorized diversion of significant volumes of water (2.5 million cubic meters per year) and Nexen depends on this water licence for at least some of its fracking operations in the Horn River Basin.

The following sections attempt to summarize some of the more important of the EAB’s observations and conclusions (with the aid of some fairly liberal “cutting and pasting”) under the following headings: (1) a preliminary jurisdictional issue, (2) the role of an EAB on an appeal, (3) the object and purposes of the Water Act, (4) decision-making with incomplete information, (5) the Board’s review of the merits of the licence decision, (6) the duty to consult, (7) the decision to revoke the licence, and (8) implications for Alberta.

(1) A Preliminary Jurisdictional Issue

The EAB dealt with one preliminary jurisdictional issue at the outset, namely whether or not it had the jurisdiction to review a remedial Order that the department had issued subsequent to the licence. The First Nation evidently contended that the Order also triggered the duty to consult which the Crown had failed to discharge. The EAB was of the view that the Order was a separate decision and that the First Nation should have taken out an additional appeal if it wished to put that Order at issue. Accordingly, the EAB concluded (at para 127) that it had no jurisdiction to consider the Order. This seems entirely correct and simply serves as a reminder of the need to recognize that there may be multiple decisions that need to be considered and separate applications made for each. In most cases EABs and courts will be able to join such applications. See, for example, my post on the Northern Gateway litigation: http://ablawa.ca/2015/03/31/an-update-on-the-northern-gateway-litigation/.

(2) The Role of the EAB on an Appeal

I can do no better than cut and paste the EAB’s observations (at paras 157–158) as to its role:

The Board’s powers and procedures for hearing and deciding an appeal under the Water Act are not limited to reviewing the appealed decision, or the decision making process that led to that decision, for errors. The Board is authorized under... the Water Act to conduct an appeal as a new hearing. As such, the Panel may consider evidence that was not before the Manager, as well as any information that the Manager considered. Indeed, in the present appeal, the evidence before the Panel consisted of 19 days of oral evidence (over 2,000 pages of transcript) and 42 exhibits, some of which were short documents or maps, and some were multi-volume sets running to hundreds or thousands of pages. Both expert opinions and published hydrological literature were included in the evidence provided to the Panel. Moreover, under section 92(8) of the Water Act, the Board has broad remedial powers in deciding an appeal. In the present case, the Panel may make any decision that the Manager could have made and that the Panel considers appropriate in the circumstances.

Consequently, the Panel is not limited to determining whether there were errors or inadequacies in the Manager’s decision-making process or his decision to issue the Licence. Rather, the Panel is entitled to consider the technical merits of the Licence based on all of the relevant information presented at the appeal hearing, including information that became available after the Licence was issued, and the changes that were made in the 2013 Water Plan Addendum. As such, the Panel’s findings on the technical merits of the Licence will focus on assessing the extensive body of evidence that is before the Panel, rather than simply deciding whether the Manager’s decision or his decision-making process was flawed.
(3) The Object and Purpose of the Water Act and Other Interpretive Issues

The Board took the view that the Water Act is principally a water allocation statute (at pars 161 – 162). However, this did not mean that decision makers under the Water Act could ignore the environmental context of their decisions (at para 163):

... in deciding whether to issue a licence, the potential effects of the licensed water use on aquatic and riparian species and their habitat may be a relevant consideration. Water is a finite resource which may be subject to competing demands from private users, and adequate water quantity and quality is critical for maintaining aquatic ecosystems, including fish and fish habitat. Licensed water use may affect not only the amount of water available in a stream, but also the physical characteristics of the stream channel and banks.

The Board also commented on the ability of the original decision-maker (and itself as effectively the substitute decision maker) under the Water Act to take into account the cumulative effects of activities licensed by others that might have an impact on the ability of First Nations to exercise their treaty rights. Examples would include roads, wells and other resource developments and resource-related construction activity. The EAB concluded that such issues fell outside the Water Act and could not be considered (at para 170):

... the Panel finds that there is no basis under the Water Act for a manager, in assessing a water licence application, to consider the broad cumulative environmental effects of oil and gas developments, such as roads, gas pipelines and gas wells, in the watershed. Those activities, and their environmental impacts, are regulated under other legislation, including the Oil and Gas Activities Act. Consequently, the Panel finds that, in deciding the present appeal, the Board has no jurisdiction to order the Manager or Nexen to “examine the effect of proposed withdrawals together with other activities that may have ecological or hydrological effects on the lake or stream, such as the construction of roads, bridges or pipelines,” as requested by the First Nation.

On the other hand, decision makers under the Water Act can and must take into account the cumulative effect of other water withdrawals (at para 168):

The Panel finds that it is consistent with the purposes of the Water Act to consider the total demand from all authorized water uses on the water source, and the

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impact that the total demand may have on stream flow as well as habitat in and about the stream.

Again this distinction makes sense in an administrative law context, but it cannot release the Crown from its obligations with respect to treaty rights: see in particular Grassy Narrows First Nation v Ontario (Natural Resources), 2014 SCC 48 and my post on that decision here: http://ablawg.ca/2014/08/06/grassy-narrows-division-of-powers-and-international-law/.

The EAB also considered whether the precautionary principle should be read-in to the normative order of the statute. The Board declined to do so reasoning (at para 179) as follows:

... the Panel finds that the precautionary principle is not mentioned in the Water Act and there is no indication that the Legislature intended this principle to apply to water licensing decisions. At para 129 of Burgoon, [decision: http://www.eab.gov.bc.ca/water/2005wat024c_025c_026c.pdf] the Board rejected the proposition that the precautionary principle is one of the factors that must be taken into account in deciding whether to issue a water licence under section 12 of the Water Act . The Panel agrees with that finding in Burgoon.

However, the Board’s aversion to precaution did not prevent it from embracing (at para 183) caution:

Given the uncertainty involved in estimating stream flows and attempting to predict the potential impacts of a licence on the aquatic and riparian environment, a manager should take a conservative or cautious approach to making licensing decisions and setting conditions in a licence.

The Board returned to the need for caution several times in its discussion: see at paras 218 and 253 referring to the need for cautious use of comparator basins and instream flow models which might not be applicable in a muskeg basin setting. There are differences between caution and the precautionary principle. The latter is definitively normative (the decision maker ought to…) whereas “caution” is just good pragmatic advice, but in practical terms the outcomes may be similar in many contexts.

(4) Decision-making with Incomplete Information

The discussion throughout the decision makes it clear that the department was put in the position of making decisions on Nexen’s application with inadequate information. While this theme pervades the decision, the EAB also addressed it explicitly in relation to what seems to have been the First Nation’s argument to the effect that, given the inadequacy of the information, no licence should have been issued. The Board addressed this

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argument in two ways. First, it examined the requirements of the Act and regulation with respect to the information that an applicant must provide and then commented as follows (at para 176):

The Panel notes that section 2 of the Water Regulation does not require an applicant to provide information about the potential environmental impacts of the proposed licence. The information required under section 2 focuses on identifying the applicant, the water source, the intended amount of the water to be used, the purpose of the use, the location of the diversion point and the water use, and the locations of any works to be built and any land that may be physically affected by the water use. However, a manager has broad discretion to issue directions to the applicant and to require further information pursuant to sections 10(1)(b) and (c) of the Water Act. Given the purposes of the Water Act discussed above, additional information about the potential impacts of a licence on the water source, including aquatic and riparian species and their habitat, may be relevant to assessing a licence application, depending on the circumstances of a particular application.

Second, the Board emphasized that information requirements in any particular case must be context specific (at para 177): “The amount and type of information needed to properly assess an application to divert 500 gallons of water per day for domestic use may be quite different from the amount and type of information needed to properly assess an application to divert 2.5 million cubic metres of water per year for industrial use.” In this case, the information needs were large (at para 178):

In the present case, Nexen sought to use a large volume of water from a relatively small lake (i.e., not a major river or reservoir) for several years. There was no history of licences of a similar nature to provide guidance in assessing Nexen’s application, and there was limited hydrological information about northeast B.C., and almost no hydrological information about the Tsea River before 2009. Consequently, there was a high level of uncertainty regarding the potential effects of the Licence, and an elevated level of risk associated with those potential effects. In these circumstances, the Panel finds that additional information concerning the potential impacts of the Licence was warranted.

However, while that reasoning seemed to support the contentions of the First Nation, the EAB was not prepared to go that far, and indeed continued as follows (also at para 178):

While it is prudent in such circumstances to ask an applicant to provide further information about the water
source and the potential impacts of the proposed licence, the Panel finds that it is impractical, and inconsistent with the objective of the licensing provisions in the Water Act, to expect applicants to delay developments indefinitely pending studies that attempt to conclusively predict impacts.

The EAB reinforced that message by referring to the reality that a hard line in licence applications would simply cause applicants to pursue temporary diversion approvals rather than licence, a practice which, while recently upheld as lawful (see Western Canada Wilderness Committee v. British Columbia (Oil and Gas Commission), 2014 BCSC 1919 (CanLII)), was sub-optimal from a water management perspective (at para 180):

... the Panel notes that placing excessively onerous requirements on an applicant to gather data and conduct studies before a licence may be issued could simply result in the applicant seeking a number of section 8 approvals over a period of years, instead of a licence that lasts for a period of years. In the present case, Nexen could have continued to apply annually for section 8 approvals, as it had done since 2009, rather than applying for the Licence. Nexen's section 8 approvals imposed far less onerous requirements than the Licence. Nexen's section 8 approvals simply required compliance with a 0.1 metre maximum drawdown of the lake level, measured from the commencement of operations, and monthly and annual reporting. From a water manager's perspective, a water licence provides a means to take a longer-term approach to regulating water use and monitoring impacts. In general, a longer-term approach to managing and regulating water use will better serve the objective of conserving water resources and protecting aquatic and riparian ecosystems.

But all that said, the Board was very demanding when it came to examining the merits of the licence and its terms and conditions. Thus, what the Board seems to be saying is that while a poor information base should not automatically preclude the issuance of a licence, the decision-makers in the department must still be able to show that the licence terms and conditions are responsive to the information uncertainties. So, as with precaution and caution, so with information uncertainties!

(5) The Merits of the Licence Decision and the Terms and Conditions Attached to the Licence

This is the most extensive section of the EAB’s report. In it the EAB examines various methodological matters with respect to issues such as measuring stream flows, hydrological models, instream flow methodologies as well as the specific terms of the licence in light of these matters. I will leave the task of examining the details of this discussion to others. Suffice it for present purposes to offer the EAB’s summative conclusions (at paras 337 and 338):

In conclusion, after assessing the evidence regarding the technical aspects of the Licence and the flow-weighted withdrawal scheme set out in the 2011 Water Plan (including the 2013 Water Plan Addendum), the Panel finds that the Licence should be reversed because it is fundamentally flawed in concept and operation. It authorizes a flow-weighted withdrawal scheme that is not supported by scientific precedent, appropriate modelling, or adequate field data. Also, the flow-weighted withdrawal method relies on a set of withdrawal parameters that, except for the Zero Withdrawal Limit and the 15% withdrawal rate, are arbitrary and have no basis in scientific theory or hydrometric modelling. These parameters also rely on an Inferred Median Flow that could not be explained or justified by Nexen or the Manager. In addition, compliance with the withdrawal parameters relies on a hydrometric monitoring program that is not included in the Licence, either as an express condition or by reference to the monitoring plan in the 2011 Water Plan and the 2013 Water Plan Addendum.

Further, the Manager’s conclusion that the withdrawals would have no significant impacts on the environment, including fish, riparian wildlife, and their habitat, was based on incorrect, inadequate, and mistaken factual information and modelling results. The new, but still limited, data and information about the Tsea River watershed that became available after the Licence was issued does not support a conclusion that the Licence, together with the 2011 Water Plan and the 2013 Water Plan Addendum, adequately protect against detrimental impacts on the aquatic and riparian environment. Rather, the evidence before the Panel establishes that excessive water withdrawals may cause adverse effects on the habitat of aquatic and riparian species, including species that the First Nation depend on for the exercise of their treaty rights, as discussed further under Issue 2.

(6) The Duty to Consult

The EAB’s duty was a duty to assess whether the Crown (as aided by Nexen at least to the extent that there was a clear delegation of responsibilities) had discharged its obligations to consult and accommodate the interest of the First Nation. It was not a duty to engage in consultation itself (at paras 159 and 428).

In issuing the licence the department took the view that it had engaged in a lengthy and informed consultation process and had fully discharged its obligations. A major premise for that assessment was the conclusion that the proposed diversion would have no impact on the First Nation’s treaty rights. However, it was clear from the Board’s analysis (above) that that premise and conclusion were not supportable because the departmental decision-makers simply could not come to such a definitive judgement on the information available and the methodologies applied
to understand the impact of the diversion. This had implications for both the overall conclusion and the depth of the consultation required along the Haida spectrum.

The EAB’s key conclusions on the duty to consult were as follows:

1. The duty to consult is triggered by the potential for a proposed decision to interfere with or impair a treaty right (at para 439).

2. The degree of consultation required fell in the mid-range of the Haida spectrum (at para 440):

Given the relative importance of the North Tsea Lake area, and downstream portions of the Tsea River, to members of the First Nation for the exercise of their treaty rights, and the Licence’s potential to adversely affect the habitat of fish, beaver, moose and waterfowl in that area that the First Nation depend on to exercise their treaty rights, the Panel finds that the level of consultation required in this case was at the mid-range of the spectrum.

3. The consultation should be structured so that each party (Crown, applicant for the licence and First Nation) should be clear about needs, expectations and responsibilities. A consultation agreement between the Crown and the First Nation would be helpful in achieving this result but was not required (at paras 441 – 446).

4. Delegation of responsibilities to the applicant for the licence should be clear; otherwise the First Nation might consider that the applicant was engaging in consultation to further its own interest rather than to meet the Crown’s obligations (at para 447).

5. In order to engage in good faith consultations the Crown needs to have a clear understanding of the First Nations rights and how they might be impacted (at para 449):

To ascertain the appropriate level of consultation, the Manager, on behalf of the provincial Crown, needed to consider the potential impacts of the Licence on the First Nation’s treaty rights. To properly understand the potential impacts on the First Nation’s treaty rights, the Manager needed to understand the nature and scope of the treaty rights that could be adversely affected by the Licence.

The Crown did not in this case.

6. The First Nation also had obligations and duties and in particular needed to provide the Crown with information that would allow the Crown to assess the impacts of the proposed diversion on the First Nation’s rights. The First Nation failed to provide all

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relevant information but this was only part of the reason why the Crown failed to obtain a clear understanding of the issues.

7. While much of the Crown’s consultation activities were carried out in good faith, that was not the case for the way in which these consultations were concluded. At this stage, the Crown proceeded peremptorily and with a closed mind (at para 484):

The Panel finds that the Crown failed to consult with the First Nation in good faith. Based on the internal Ministry correspondence and the Manager’s rationale, the Panel finds that by April 2012, the Manager intended to issue the Licence regardless of the promised meetings, and had no intention to substantially address any further concerns or information that may have been provided by the First Nation. The Panel finds that this conduct was inconsistent with the honour of the Crown and the overall objective of reconciliation.

(7) Decision to Revoke the Licence

While alive to the prejudice that Nexen would suffer the Board still concluded that revocation of the Licence (rather than, say, changing its terms and conditions) was the appropriate remedy. The Board reasoned as follows (at para 490):

In contrast [to the Chief Harry Case, available here: http://www.eab.gov.bc.ca/water/2011wat005c_006c.pdf], in the present case, the Licence authorizes a much greater percentage of the stream flow from a relatively small water source, and the Panel has found that the Licence and the flow-weighted withdrawal scheme are fundamentally flawed and lacking in technical merit. There remains considerable risk that the licensed water withdrawals could cause harm to aquatic and riparian habitat and species that the First Nation depends on for the exercise of its treaty rights. In addition, the Panel has found that the consultation process was seriously flawed, as the Ministry never explained the process it intended to follow or Nexen’s role in the process, the Manager did not consider critical information that was available to him regarding the First Nation’s exercise of its treaty rights in the Tsea Lakes area, the Manager considered inaccurate and irrelevant information, and the Crown failed to consult in good faith. The Panel finds that suspending the Licence pending further consultation would not necessarily address the serious flaws in the licensing regime, or “protect Aboriginal rights and interests to promote the reconciliation of interests called for in Haida Nation” as stated in Rio Tinto.

(8) Implications for Alberta

The direct implications of this decision for Alberta are, I think, quite limited for two reasons. First, and most obviously, the creation of the Alberta Energy Regulator has effectively limited the jurisdiction of Alberta’s EAB. While the EAB generally does have jurisdiction of water licensing decisions under Alberta’s Water Act, RSA 2000, c. W-3, it has no such jurisdiction where the water licence is issued by the AER as part of the single window approach to licensing energy projects which lies at the heart of the Responsible Energy Development Act, SA 2012, R-17.3 (REDA). I commented on this aspect of REDA here: http://ablawn.ca/2012/11/09/bill-2-and-its-implications-for-the-jurisdiction-of-the-environmental-appeal-board/. Second, the vigour and reach of an EAB very much depends on the standing rules for commencing an appeal. These rules are very tightly and narrowly defined in Alberta and thus it is extremely difficult for parties, and especially ENGOs, to obtain standing. And since these standing rules are effectively jurisdictional rules for commencing an appeal there is little chance of persuading the courts to adopt a more general public interest standing approach. See here in particular Alberta Wilderness Association v Alberta Environmental Appeal Board, 2013 ABQB 44 commented on by Professor Fluker here and Bankes, Sharon Mascher and Martin Olszynski, “Can Environmental Laws Fulfill their Promise? Stories from Canada” (2014), 6 (4) Sustainability online The AER’s own standing rules are also particularly demanding, especially for First Nations asserting treaty rights. See my post on the AER’s practice here: http://ablawn.ca/2014/06/03/4447/.

There are however some indirect implications to consider. First, both of the arguments recited above beg the question of whether Alberta should learn from BC. Or, to put it another way: (1) should Alberta allow a merits-based review of AER decisions, and (2) should the EAB’s jurisdictional standing rules in Alberta continue to ignore the developments in public interest standing that we have seen over the last decade, or, should the relevant statutes be amended to allow a broader range of parties to question departmental decisions in appropriate cases. I understand that the government is busy right now addressing royalty issues and climate change law and policy, but perhaps when things die down these questions might be worth examining again! Second, I think that the detailed discussion of the trigger to the duty to consult in a treaty context and the content of that duty in the context of resource licensing decisions provides a useful learning opportunity for both the AER and Alberta’s EAB. ☞
The Negotiator’s Message From the Board

Social
I have had the privilege of working with many outstanding volunteers on the various social committees and I would like to extend my sincerest gratitude to all these volunteers. None of CAPL’s social events would be possible without their dedication. Additionally, I’d like to thank all the gracious and amazing event sponsors for their various contributions, as again, none of CAPL’s social events would be possible without their support. All of CAPL’s volunteers and social event sponsors have worked tirelessly throughout the year, resulting in what I would classify as an exceptionally great year for CAPL social events as 2015 has been met with many ominous challenges. With these challenges has come the opportunity for CAPL’s membership to pull together during tough times in order to produce remarkably high-quality social events, ensuring the experiences received at each event has been worthwhile for both our members and our valued sponsors.

This year’s CAPL Sponsored social calendar was kicked off by Natalie Carson and Will Glass’ popular ski trip to Lake Louise. Kevin Koopman and his committee organized another successful Curling Bonspiel at the Calgary Winter Club, while Robert Bodzioch and his crew hosted another excellent squash tournament at the Glencoe Club. Michelle Holt and her committee worked diligently to host the first annual Spring Barn Burner at Cowboys Dance Hall, while Derek Jacobus and his committee had to make the difficult decision to cancel this year’s 9 Ball Pool Tournament. Chad Hughes’ committee kicked off the summer with the Triple Round Up at Craft Beer Market, while Craig Stayura and his team hosted another successful Golf Tournament, followed by the season ending annual Trap Shoot hosted by Ryan Hall’s committee. In addition to the CAPL Sponsored social events, CAPL Endorses numerous events, including the Junior Landman Golf Tournament, which, unfortunately was postponed this year, but will hopefully be resurrected in 2016 under Josh Wylie and his committees guidance. As well as the PLM Alumni Charity Golf Classic organized by Ryan Armstrong and his team which enjoyed their 25th year in Canmore while Kevin Egan’s annual Salmon Fishing Trips were also great successes. The summer was capped off with the annual the 10K Road Race and Fun Run hosted by Dan Cicero’s group and Chris Ellis’s committee’s Ugly Oil Speak Easy: Crohn’s and Colitis Charity and Networking event. On behalf of all the organizing committees, I’d like to thank each member for their attendance and support of each event!

Through these events the CAPL was able to donate to local charities including the PREP (Pride-Respect-Empowerment-Progress) Program, the Tour for Kids Alberta, University of Calgary Research Department for Crohn’s and Colitis, and our own PLM Endowment Fund.

Despite these challenging times (or because of them), I’d like to encourage all of CAPL’s members to get involved in any committee you feel passionate about and I invite all members to register for upcoming social events in 2016. These events are not only a great occasion to catch up with old friends, but they provide an opportunity to expand your network and create valuable relationships with fellow CAPL members and industry contacts.

Jordan Murray
Secretary/Social Director
The Business Efficacy of Licences
A Governmental Duty to Provide Access?

AFTER A LONG AND STORIED PROCEDURAL HISTORY, THE BRITISH COLUMBIA COURT OF APPEAL (“BCCA”) RELEASED ITS DECISION IN MOULTON CONTRACTING LTD. V BRITISH COLUMBIA (THE “MOULTON DECISION”) reversing a $1,750,000 damage award. In the Moulton Decision, the BCCA rejected claims of negligent misrepresentation and breach of an implied contractual term against the Province of British Columbia (the “Province”) for its actions in relation to a blockade that prevented a BC logging company’s activities under two licenses issued by the Province.

Factual Background
Moulton Contracting Ltd. (“Moulton”) was prevented from logging under two timber sale licences issued by the Province (the “Licences”) by a blockade on the road access erected by individual members of the Fort Nelson First Nation (“FNFN”). Moulton acquired the Licenses through a bid process administered by British Columbia Timber Sales (“BCTS”) which gave Moulton a right of entry and a right to harvest timber in the Fort Nelson Timber Supply Area, which is located in Treaty 8 territory.

WRITTEN BY
KIMBERLY MACNAB &
KIMBERLY HOWARD
MCCARTHY TETRAULT LLP
As part of the bid process for the Licenses, Moulton received a document titled “Particulars of the Invitation for Applications”, which included a disclaimer that BCTS did not guarantee a licensee’s right of unfettered access to the relevant harvesting area, as such access may be impeded by the actions of third parties. The Licenses themselves also considered such impediments, as two key clauses limited the Province’s liability. Clause 9.01 stated that the Province could vary or suspend the Licences in the event a court found that the Licences infringed an Aboriginal right. Clause 14.01 stated that the Province was not liable for losses caused by third parties, including interference with the licensee’s operations by road blocks or other means.

In accordance with its constitutional duty to consult Aboriginal groups, the Province had conducted a consultation process in 2005 with respect to a proposed amendment to the Forest Development Plan. Moulton did not undertake any consultation actions with the FNFN. After Moulton acquired theLicenses, the Province received correspondence from George Behn, a member of the FNFN, indicating certain members of the FNFN intended to stop the logging. Two months later, after Moulton had commenced harvesting operations, the Province informed Moulton of this threat. A few days later, the blockade was erected. Through their blockade, George Behn and other members of the FNFN ultimately prevented Moulton from undertaking its harvesting operations under the Licenses. Having suffered significant losses as a result, Moulton sued the Province for negligent misrepresentation and breach of an implied contractual term, hanging its claims on an implied promise by the Province to guarantee access under the Licenses.

**Issues on Appeal**

On appeal, the issues concerned the Province’s responsibilities under the Licences and boiled down to a key question with potentially broad implications: did the Province have a positive duty under the Licences to ensure access, or to inform Moulton of potential threats to that access?

Moulton raised a number of compelling arguments concerning implied terms and promises, fighting an uphill battle against the Licences’ explicit exclusion of liability for impediments to access. Moulton also raised the recent Supreme Court of Canada (“SCC”) decision in Bhasin v Hrynew (“Bhasin”), arguing that the principles of good faith in contract and the duty of honest performance should operate to imply an obligation to guarantee access into the Licences. ²

Moulton’s arguments fell flat at the BCCA, which refused to apply the Bhasin decision to stretch the principles of contractual interpretation to imply a term not contemplated by the parties. Most importantly, the BCCA refused to accept that the Province’s explicit disclaimers and limitations of liability within the Licences should be altered by implied terms or good faith duties, particularly absent any evidence of bad faith, dishonesty or capricious conduct.

**A Provincial Obligation to Ensure Access?**

If the Licenses did not contain explicit limitations of liability, would a project proponent like Moulton have been able to recover losses from the Province? To this end, Moulton argued that the Province was liable for negligent misrepresentation by its failure to inform Moulton in a timely manner of the potential interference with its ability to give effect to the Licences. Moulton attempted to establish that the Province had a positive duty to inform Moulton of the threat made by George Behn against Moulton’s operations. The difficulty in finding liability for negligent misrepresentation was that the Province never made an express representation to Moulton that such threats were absent, and thus liability required some sort of positive duty to be established on the part of the Province.

Moulton’s claims were based on reliance: Moulton argued that it had relied on implied promises by the Province that (i) the Licenses guaranteed access to the Fort Nelson Timber Supply Area; and (ii) the Province had conducted a proper consultation process with all relevant Aboriginal groups.

After a thorough examination of the principles of contract law relating to implied terms and contractual interpretation, the BCCA rejected Moulton’s claims against the Province. The Province had deliberately and explicitly exempted itself from liability by including Clauses 9.01 and 14.01, which specifically contemplated interference with the Licensee’s operations caused by third parties. While the Moulton Decision provides an interesting analysis of contract law in coming to its conclusions, absent such explicit limitations of liability, the implications of Moulton may vary.

Importantly, the BCCA interpreted the fundamental nature of the parties’ contractual relationship under the Licences to be one in which the Province permitted access to a particular area. The parties’ relationship under the Licences was not, in contrast, one in which the Province guaranteed access to a particular area. The nature of the relationship did not include positive steps on the part of the Province.³

The more widely applicable principle espoused by the BCCA in the Moulton Decision is therefore that a licensee, in participating in the bidding process and obtaining a license for natural resource extraction, is obtaining permission to access an area and use its resources. The nature of this government-licensee relationship does not create a positive duty on the part of the Province to guarantee access to that area.⁴ In an environment of increased awareness and participation of Aboriginal groups in the regulatory process, licensees wishing to protect their interests should embark upon their own stakeholder consultation process to ensure that they are not caught unawares by opposition.

**Implications in Alberta?**

With respect to licences granted in Alberta for oil and gas development and the accompanying surface rights, this BCCA decision offers useful insight into the relationships between governmental entities and licensees. While the terms of an oil
and gas development licence granted by the Alberta Energy Regulator may differ from BC timber licences, this decision reinforces the importance of strategic consultation and due diligence with respect to local stakeholders to ensure the requisite surface access is acquired pursuant to the Surface Rights Act⁵ or the Public Lands Act.⁶

Further, any strategic consultation should include work with Alberta’s Consultation Office (the “ACO”). The ACO was introduced by the Government of Alberta on November 1, 2013 to enhance coordination and service delivery related to the consultation process in the province.⁷ The ACO is aligned with regulatory bodies in Alberta, and ideally should enhance consistency and coherency with respect to consultation efforts in Alberta. While the duty to consult rests with the Government of Alberta, certain aspects of the consultation, such as the procedural aspects of the consultation, may be delegated. Some of these aspects are delegated to project proponents. Taken with the Moulton Decision, the Government of Alberta’s stance on proponent-led consultation should provide a strong indication to project proponents that they must take proactive steps toward ensuring consultation efforts are not only adequate, but effective and meaningful.  

Notes
1. Moulton Contracting Ltd. v British Columbia, 2015 BCCA 89 [Moulton]. This case involved many procedural and substantive decisions at all levels of court, but the trial decision directly at issue in Moulton was the Order of the Supreme Court of British Columbia made in Moulton Contracting Ltd. v British Columbia, 2013 BCSC 2348 [Trial Decision].
2. Bhasin v Hrynew, 2014 SCC 71 [Bhasin].
3. See Moulton at paras 94-99.
4. See Moulton at paras 94-99.
6. RSA, 2000, c P-40.

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27th Annual CSPG/CSEG and CAPEL 5K Fun Run and 10KM Road Race

THE 27TH ANNUAL CSPG/CSEG AND CAPEL 5K FUN RUN AND 10KM ROAD RACE went off under sunny skies on Wednesday, September 23. The course followed the Bow River pathway system: west from the Eau Claire YMCA to the east end of Edworthy Park and then back to Eau Claire YMCA.

Afterwards, participants headed over to the Calgary Curling Club for dinner. This well organized event proves to be one of the best bargains on Calgary’s race calendar. For the reduced entry of $40.00, CAPL participants received a souvenir running shirt, a pasta dinner, refreshments and a chance to win one of the many category awards and draw prizes.

This year there were some new medalists in the CAPL division. Congratulations to Jennifer MacDonald who was the fastest female Landman, and to Dave Bracey who regained the title as fastest male Landman! Also props to Sean McLeod who ran a solid race for silver and Tim Lee who cracked the podium for third. Next year, we can’t let CNR sweep again, so let’s start training!

Make sure to watch the May and June 2016 Negotiator and the CAPL and CSPG websites for details on the 2016 event that is schedule for September 21, 2016. We look forward to seeing you at next year’s race.
The key discussion items at the CAPL Board of Directors’ Meeting held September 8, 2015 at the CAPL Office were as follows:

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<tr>
<th>In Attendance</th>
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<th>Guests</th>
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<tr>
<td>N. Sitch</td>
<td>L. Buzan</td>
<td>G. Richardson</td>
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<td>A. Webb</td>
<td>J. Murray</td>
<td>N. Millions</td>
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<td>T. Lefebvre</td>
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<td>K. Gibson</td>
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- Guest Jim MacLean presented an update on the amendments to the 2015 CAPL Farmout & Royalty Procedure and the 2015 Operating Procedure. These amendments benefit members by helping to manage change and reflect the needs of our business today.

- Andrew Webb, Director of Finance, presented a Treasurer’s Report as at August 31, 2015, and updated September 3, 2015 showing CAPL investments totalling $989,069.28 CDN plus a cash balance of $166,007.03 for a total of $1,155,076.31 CDN. The CAPL Scholarship Fund has a balance of $246,549.76 CDN. There were no transfers made since the last report.

- Ryan Stackhouse, Director of Member Services presented applications for three (3) Active members, one (1) Associate member and five (5) Student members. In addition, an application was made to change two (2) members status from Active to Senior. All applications were subsequently approved by the Board of Directors.

- Kent Gibson, Director of Communications advised the printing contract for The Negotiator is up for renewal. The Communications committee has researched multiple scenarios and alternatives with regards to costs and products. Based on the results of this research and the subsequent negotiations with McAra, Kent made a motion to approve the renewal of CAPL’s contract with McAra for the printing of The Negotiator. The motion was approved by the Board.

- Larry Buzan, Vice President presented a motion to approve the reimbursement of expenses relating to membership fees and the application form of CAPL’s Past President joining AAPL as there is a requirement for this position to serve on the Board of Directors for the AAPL. The motion was approved by the Board.

- Bill Schlegel, Director of Education updated the Board that the Education Committee has been, and will continue to review course registration to ensure breakeven course registration revenues and expenses are being met, and when necessary, courses will be cancelled or postponed.

- Paul Mandry, Director of Field Acquisition and Management (‘FAM’) advised the Board they have filled the First Nations Consultation Advisor role that was posted on CAPL’s website. CAPL liaisons were in attendance for a meeting hosted by the University of Alberta to discuss Grazing Leases.

- Ted Lefebvre, Director of Business Development (AB & BC) updated the Board that Steve Moran represented CAPL at the Energy and Mines Ministers Conference (‘EMMC’) July 19-21, 2015 in Halifax, Nova Scotia. Steve was able to explain to various attendees what CAPL is, and how it benefits the industry through our involvement with various issues. Although, not a formal theme, there was a consistent overarching theme of social responsibility and the challenges facing industry in this regard.
• Larry Buzan informed the Board that the 2016 Conference Committee will once again be chaired by Colin McKinnon while the various chairs of each portfolio are being finalized.

• Nikki Sitch, President, updated the Board that she recently met with CAPLA to continue working on joint initiatives together.

• Andrew Webb updated the Board that although committees have done a good job of limiting revenue shortfalls by bringing in more revenue than originally budgeted, unfortunately CAPL is projected to have a substantial shortfall in revenues as sponsorship and course registration are significantly down in 2015. Andrew also noted that there were a lot of one-time costs in 2015 versus previous years which has been detrimental to CAPL’s overall budget. Going forward in 2016 the Board may need to make tough decisions regarding costs.

• Jordan Murray, Director of Social presented an update to the Board summarizing the CAPL Golf Tournament and CAPL Trap Shoot, which were both very successful and well attended. Thank you again to all sponsors and event attendees.

• Nikki Sitch updated the Board that CAPL and various associations and Government groups have been meeting to crystallize synergies and strategies for a multitude of issues and policies, including CAPP, EPAC, CAPLA, AASLA and IRWA. CAPL has representatives working closely with the Alberta Royalty Review Panel, and the Ministers of Energy and Finance.

• Michelle Creguer, Director of Business Development (AB Oil Sands and SK), updated the Board on CAPL’s involvement at the September 2 pre-budget meeting with the Ministers of Energy and Finance.

• Larry Buzan updated the Board on CAPL’s initiative to offer assistance to CAPL members in the form of office use assistance and coordination of office space with sponsors/member companies as applicable. A CAPL e-mailer update was sent in this regard.

• Nikki Sitch reminded the Directors of the following:
  • The next Board of Directors’ Meeting will be on October 6, 2015; and
  • The next General Meeting will be the CAPL Connection September 18 at the Fairmont Palliser Hotel.

Jordan Murray
Secretary/Director, Social
Get Smart

The CAPL Education Committee is pleased to present the following courses:

**Evaluation of Canadian Oil and Gas Properties for Landmen**

**NEW COURSE**

- November 4, 2015, 8:30 a.m. to 4:30 p.m.
- November 5, 2015, 8:30 a.m. to 4:30 p.m.

The course objective is to focus on understanding the process of evaluations and understanding the outputs so that land professionals understand what oil & gas evaluators do and what they report. Learning objectives include; definitions of reserves and resources and what they mean to a firm, the process of estimating reserves and resources including the income method, calculations of recoverable volumes, price forecasts, operating and capital costs and royalties.

**Fiduciary Duties**

- November 4, 2015, 9:30 a.m. to 12:00 p.m.

This half day seminar will focus on problem areas arising in the context of both transactions and day-to-day operations. Case examples and court decisions specific to land related issues will be presented and discussed. Specifically, this course will emphasize situations and circumstances where fiduciary duties do and do not arise and the nature of these duties.

**Aboriginal Affairs**

- November 10, 2015, 8:30 a.m. to 12:00 p.m.

This session is especially useful for those interacting with Aboriginal governments, businesses and communities, and helps in building positive relationships to enhance effectiveness with Aboriginal people.

**2007 CAPL Operating Procedure**

- November 17, 2015, 8:30 a.m. to 4:30 p.m.

This one day course is an overview of the 2007 CAPL Operating Procedure focused specifically on the changes between the 1990 and the new document. It is meant to enable personnel to appreciate substantive differences between the 1990 and the 2007 documents.

**Enhancing Strategic Perspective** **NEW COURSE**

- November 18 & 19 2015, 8:30 a.m. to 4:30 p.m.

Participants in this course will learn how to: Apply the Enhancing Strategic Perspective model, broaden their view of the environment and lengthen the time horizon over which they plan, reflect on the impact of their actions and decisions, synthesize disparate information and see the interrelationships between issues and people, be diligent in making choices and prioritizing time, energy and resources, apply tools and strategies to increase strategic capability and communicate in a way that increases others’ perceptions of their strategic capability. Some Pre-Work is involved, please see the CAPL website for more information.

**Professional Ethics: Theory and Application**

- November 18, 2015, 8:30 a.m. to 4:30 p.m.

This seminar is intended to increase the understanding of ethics and dimensions to ethical behavior by stimulating the ethical thought process, giving a basic introduction to the nuances of ethics, introducing a number of methods used in ethical decision making.
making, and providing a forum for discussions with respect to land related ethical issues. Case studies will encourage class discussion and give each participant insight into the morality vs. legality question.

**Advanced Surface Rights**  
*DATE CHANGED*  
November 19, 2015  
8:30 a.m. to 4:30 p.m.

This seminar is directed towards members of industry with five or more years’ experience and is intended to summarize and describe all facets of surface rights within the oil and gas business. Registrants should consider Introduction to Surface Rights or at least 5 years of field experience as a prerequisite for this course. It will include the following topics: history, contrast of surface rights and mineral rights, land titles, land agents, operators / lessees, documents, applications for right of entry, applications for well licenses or pipeline permits and surrender or termination of interests.

**Royalty Agreements (morning)**  
*DATE CHANGED*  
November 25, 2015  
8:30 a.m. to 12:00 p.m.

This half-day seminar is designed to assist in interpreting and reviewing royalty clauses and agreements. It will examine the critical components of a royalty agreement, and will discuss such topics as: qualifying an overriding royalty (i.e. an interest in land vs. an interest in the proceeds from the sale of production); proper deductions in calculating an ORR; rights and obligations of the royalty owner and payor; and securing payment of an ORR.

**Drilling & Production Operations**  
November 26 & December 1, 2015  
8:30 a.m. to 4:30 p.m.

This seminar will give a non-technical overview of oilfield operations in Western Canada. The major topics of drilling, well completion, and production operations will be covered. In the drilling section, the instructor will discuss drilling and other operations such as logging, drill stem testing, coring and cementing. The completion section will include a discussion of the service rig, perforating, stimulation and downhole equipment. Production operations will cover production facilities and equipment, methods of artificial lift and enhanced recovery techniques.

**Directive 056: AER Energy Development Applications Public Consultation Requirements (PSL®)**  
December 2, 2015  
8:30 a.m. to 4:30 p.m.

The AER (the “Board”) believes that appropriate notification and public consultation must be conducted well in advance of the
submission of an application to the AER. It must be thorough enough to allow all parties who are affected to be sufficiently aware of not only the proposed project, but the Board process as well. The Board believes that the public must have sufficient information to participate meaningfully in the decision making process, to voice their concerns and have their concerns heard and properly addressed, and if possible, resolved. The proponent’s information must be extensive, consistent, factual and must be disclosed in a timely manner, and if the proposal is part of a larger project, the proponent should be prepared to discuss the entire project and explain how its components compliment other energy development plans in the area. This seminar helps proponents understand the public consultation requirements, expectations of the AER and assists companies in completing the application or audit processes for regulatory compliance.

**Preparing for a Surface Rights Board Hearing (PSL®)**  
December 03, 2015 8:30 a.m. to 4:30 p.m.

This course will begin by covering the types of surface rights board hearings, including compensation, rent review, damage claims and back rent. The next section will focus on the structure of the hearing and deal with procedural elements, evidence taken under oath, direct and cross examination of witnesses and questions from the board. From there the course will focus on evidentiary issues like the burden of proof and discuss privacy issues before closing by discussing the orders ultimately issued by the board.

**Negotiation Skills for Surface Land Agents (PSL®)**  
December 8, 2015 8:30 a.m. to 4:30 p.m.

This seminar will examine the common struggle we often experience between meeting our substantive needs in the negotiation while maintaining or improving the working relationship. This workshop also provides a number of interactive industry related negotiation scenarios during the day that allow the participants an opportunity to apply the skills learned during the early stages of the workshop.

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**Got News?**

Do You Have An Interesting Topic That You Think Would Be of Interest to Your Fellow CAPL Members?

Have you run across a specific situation in your day-to-day tasks that has left you wondering? Our Editorial Staff are looking for noteworthy ideas, and whether you have an author in mind or not, we would appreciate the opportunity to take your ideas to article format to be published in The Canadian Association of Petroleum Landmen’s monthly magazine, *The Negotiator*.

The Editorial Committee is interested in receiving articles and article ideas dealing with a wide variety of topics, from pertinent government issues, to current and changing technical trends that would be useful to CAPL members. As well, CAPL education information is always welcome in order to keep the membership informed and up-to-date.

We are also interested in receiving informative articles of a business nature – articles that will help to keep our members in-the-know when it comes to their day-to-day negotiations. Finally, for all the history buffs out there, we appreciate stories that tell of the CAPL’s vibrant history.

Submission guidelines can be found on the CAPL website at landman.ca/publications/Negotiator/2012%20negotiator_submission_guidelines.pdf. If you are interested in contributing to *The Negotiator*, please contact Mark Innes at marksinnes@shaw.ca or Amy Kalmbach at akalmbach@strikerexp.com with your article submissions or questions.

*Senior Editorial Staff*  
*The Negotiator*
Roster Updates

On the Move

Tyler Adair
NAL Resources Limited
to Progress Energy Canada Ltd.

Garth Buchholz
PrairieSky Royalty Ltd.
to HITIC Energy Ltd.

Larry Buzan, P.Land
Niven Fischer Energy Services Inc.
to Buzanlc Consulting Ltd.

Dan Cicero
Hunt Oil Company of Canada, Inc.
to Canada Capital Energy Corporation

Frank Cortese
Coda Petroleum Inc.
to Eagle Energy Trust

John Devine
RPS HMA
to Pembina Pipeline Corporation

Joe Ewaskiw
Legacy Oil + Gas Inc.
to Independent

Lori Forte
Apache Canada Ltd.
to Independent

Rob Fraleigh
Canadian Natural Resources Limited
to Independent

Carol Gardipie
ConocoPhillips Canada
to Independent

Kyle Goulet
Penn West Exploration
to Independent

Carolyn Ink
Penn West Exploration
to Independent

Dylan Johnson
Independent
to Nexen Energy ULC

Tracy Kurtz
Independent
to Questfire Energy Corp.

Joe Lamantia, P.Land
Apache Canada Ltd.
to Woodside Energy International (Calgary) Limited

Chris Lamb
Athabasca Oil Sands Corp.
to Longshore Resources Ltd.

Melanie Lindholm
Cenovus Energy Inc.
to Heritage Royalty

Robert Mardjetko
Pengrowth Energy Corporation
to Independent

Phillis McCabe
Independent
to Bellatrix Exploration Ltd.

John Nichols
Independent
to NAL Resources Limited

Bill Orchard
EOG Resources Canada Inc.
to EOG Resources Inc. (Oklahoma City)

Colin Page
Legacy Oil + Gas Inc.
to Vermilion Resources Ltd.

Marc Paquet
Vertex Professional Services Ltd.
to Independent

Jeff Pike
Terra Energy Corp.
to Lexus Resources Ltd.

Mark Pinsent, P.Land
Imperial Oil Resources
to Independent

David Pyke, P.Land
StonePoint Energy Inc.
to Endurance Energy Ltd.

Jim Rae
Coral Hill Energy Ltd.
to Tyranex Energy Ltd.

Arjay Ratcliffe
Independent
to Crescent Point Energy Corp.

Shirley Rattray
Talisman Energy Inc.
to Independent

Troy Smith, P.Land
Endurance Energy Ltd.
to Independent

Gordon Timm, P.Land, PSL
Chevron Canada Resources
to Chevron North American Exploration and Production Co.

Nolan Treble, PSL
Legacy Oil + Gas Inc.
to Traverse Land Group Ltd. (Weyburn)

Chris Trudel, PSL
Encana Corporation
to Independent

Wendy Whittaker
Independent
to Spartan Energy Corp.

Bernie Wylie
Paramount Resources Ltd.
to Independent

Sam Yamada
Penn West Exploration
to Niven Fischer Energy Services Inc.
THANKS AGAIN TO ALL THOSE THAT ATTENDED OUR 10TH ANNUAL CAPL SALMON FISHING ADVENTURE. We definitely had all cylinders working hard this trip from wildlife viewing, to fishing, to smooth transportation to the fabulous weather! We saved 1.5 hours flying travel time each way by using the 737 with nary a moment of delay this trip which was awesome. Weather cooperated to the extreme and fishing was solid. Staff was jumping and running around making sure everything was tip top for our trip.

The first afternoon on September 1, 2015 saw lots of salmon (chinook, coho and chum) come to the boats as well as bottom fish such as rockfish, halibut and lingcod even though the west side was not open. Numerous chinook, coho and halibut hit the dock this first afternoon. Given the previous trip endured bitter gale force winds we did not know what to expect upon completing our safety orientation. All in all it was not bad.

The second day saw amazing weather with calming seas on the west side. The salmon were also cooperating and we started to see even more coho hitting the board which was a nice bonus. A 10.5 pound coho hit the dock on Wednesday followed by a 12 pounder. A fine 31 lb tyee was brought to the docks and the question was would it stand up as the winning trip? Lots of other chinooks, rockfish, cohos, chums and even a sockeye came to the docks. One guest boated a 44 lb lingcod and almost everyone saw a sealion.

The third day saw amazing weather with calming seas on the west side and abundant bottom fish made for a long day of reeling up fish for some. The salmon were also cooperating and we started to see even more coho hitting the board which was a nice bonus. Another 30.5 lb tyee was boated and then promptly followed up by a 36.6 lber. Bait was everywhere it seemed and a large 13 lb coho was a lucky anglers reward. We saw a great 51 lb halibut and also a 23 lb yellow-eye!

The fourth day saw even better weather with the west side staying open with an ocean so calm you could have fished from an air mattress. Tides seemed to work nicely for salmon and bottom fishing as they play a big role in moving fish around as well as creating rough seas when you get tide on wind. It flows like a river and when it meets other tidal currents it can create nasty waves. When it flows up and over shallower bottom areas like shallow reefs it creates rapids like in a river. When you have these happening...and you have wind blowing in the opposite way you get compounding tide against wind waves. I have see this produce waves upwards of 10 feet high in places. All around it there can be flat water. Langara does a great job stopping people from being in dangerous situations as everyone wants to fish however SAFETY always trumps fishing.

The food at the lodge continued to impress. When you eat your veggies and salad you know something is right in the world of food. People were able to hit the west side again with their BFF (”bottom fishing friend”) and a 35 lb halibut was caught along with numerous others. Lingcod up to 23 lbs were reeled up as well as red snapper to 14 lbs. Lots of salmon were caught including an amazing 17.5 lb coho! Today the orcas showed up and were very entertaining and barely impacted the fishing.

The fifth day (on September 5, 2015) saw rough waters around the entire island in the morning. Orcas where slicing through the waves chasing salmon. Many anglers slept in after fishing hard for 4 days and having their limit. I ended up taking 3 fresh coho home which was a big problem it turned out. As soon as my friends found out I had arrived home with some fresh fish it was quickly claimed. Still given how far this type of fishing is away from Calgary I just can’t resist fishing that last morning. How can anyone come in early with such great fishing begging you to stay?

If you or someone you know is interested in coming fishing with us in 2016 please do not hesitate to contact Kevin Egan: Kevin. egan@huskyenergy.com. Our 2016 trips are scheduled for May 31 to June 4, 2016 as well as August 30 to Sept 3, 2016. Also please feel free to visit the CAPL website for more details. We have an excellent group discount as well as tremendous convenience of travel with a direct flight from Calgary to Masset in the Queen Charlottes.

Kevin Egan
38th Annual CAPL Trap Shoot

THE 38TH ANNUAL CAPL TRAP SHOOT WAS HELD, AS USUAL, AT THE AHEIA CALGARY FIREARMS CENTRE near DeWinton on Saturday September 12, 2015. 37 members and guests showed up for the shoot this year, on a gorgeous late summer day. Everyone was able to participate in a great day of networking, camaraderie, and of course shooting the 16 yard singles event, the Slider event, and the Handicap event, as well as the usual buddy shoot and Annie Oakley. All the shooting was complemented by another delicious BBQ luncheon courtesy of John Kanderka’s Viper Consulting Inc. and Dave Arthur’s 302 Consulting Ltd. The committee members congratulate Mr. Ed Grandan on winning the Granite Oil Corp. High Overall Trophy again for the 14th consecutive year in a row!, Mr. Brent Lewis on winning the McMillan LLP Class A 16 yard event Trophy, Mr. Mike Jamieson on winning the Gowlings LLP Slider event Trophy, Mr. Chris Lizotte on winning the Pengrowth Energy Corporation Class A Handicap event Trophy, and Mrs. Janet Latour on winning the Norton Rose Fulbright Inaugural Participant Trophy.

On behalf of the committee, which includes, Chris Lizotte, Hugo Potts, Roberta White and Kyle Huntley, I would like to thank all the members and guests that came out and gave it their all this year. We’ll see you again next year on Saturday, September 10, 2016, for the 39th edition of the CAPL Annual Trap Shoot.

This year was a tough one for the industry, sponsorship and attendance. The committee, also wish to express our appreciation and gratitude to the following sponsors for their generous support; without them we would not be able to hold the shoot every year. Please make sure you thank these sponsors for their generosity the next time you are doing business with them.

Ryan Hall, Chairman

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Norton Rose Fulbright LLP Pengrowth Energy Corporation
Gowlings LLP
Granite Oil Corp.

Lunch Sponsors
Viper Consulting Inc. 302 Consulting Ltd.

Sponsors
Alberta Hunter Education Instructors’ Association
Devon Energy
Caltech Surveys Ltd.
McElhanney Land Surveys Ltd.
# The Social Calendar

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<tr>
<th>EVENT</th>
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<th>EVENT DATE</th>
<th>TIME</th>
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<tr>
<td><strong>CAPL November General Meeting</strong></td>
<td>19-Nov-15</td>
<td>5:00 PM</td>
<td>The Westin</td>
<td>19-Nov-15</td>
<td>5:00 PM</td>
<td>The Westin</td>
<td>Members: No Charge Non-Members: $94.50 Student Members: $47.25</td>
<td>Kaitlin Polowski</td>
<td>(403) 237-6635</td>
<td><a href="mailto:reception@landman.ca">reception@landman.ca</a></td>
<td>13-Nov-15</td>
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<tr>
<td><strong>CAPL Christmas Networking</strong></td>
<td>17-Dec-15</td>
<td>5:00 PM</td>
<td>The Ranchmen’s Club</td>
<td>17-Dec-15</td>
<td>5:00 PM</td>
<td>The Ranchmen’s Club</td>
<td>No Charge for Members No Charge for Student Members Guests $84.00</td>
<td>Karin Steers</td>
<td>(403) 237-6635</td>
<td><a href="mailto:ksteers@landman.ca">ksteers@landman.ca</a></td>
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<td><strong>CAPL Ski Trip 2016</strong></td>
<td>5-Feb-16</td>
<td>7:00 AM</td>
<td>Lake Louise (bus pickup at Staples/old Target, West Hills)</td>
<td>5-Feb-16</td>
<td>7:00 AM</td>
<td>Lake Louise (bus pickup at Staples/old Target, West Hills)</td>
<td>Members: $135.00 Non-Members: $150.00</td>
<td>Will Glass</td>
<td>(403) 648-2302</td>
<td><a href="mailto:will.glass@bonavistaenergy.com">will.glass@bonavistaenergy.com</a></td>
<td>27-Jan-15</td>
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*Please note: Registration forms can be downloaded from the CAPL website:
General Meetings: [http://landman.ca/events&meetings/general_meetings.php](http://landman.ca/events&meetings/general_meetings.php)
Social: [http://landman.ca/events&meetings/social_events.php](http://landman.ca/events&meetings/social_events.php)
November Meeting
Sponsored by IHS
November 19, 2015
General Meeting • Speaker: TBD
Cocktails: 5:00 p.m.
Dinner: 6:00 p.m.
Where: The Westin Hotel
320 – 4 Avenue S.W.
Cost: No Charge for Members
Non-Members: $94.50 (includes $4.50 GST)
Students $47.25 (includes $2.25 GST)
To register, please go the event tab on the CAPL website.
Deadline for registration is noon, Friday, November 13, 2015.

December Meeting
Sponsored by IHS
December 17, 2015
CAPL Christmas Networking
Time: 5:00 p.m.
Where: The Ranchmen’s Club
Cost: No Charge for Members
No Charge for Student Members
Guests $84.00
To register, please go the event tab on the CAPL website.
Deadline for registration is noon, Friday, December 11, 2015.

CAPL Calendar of Events

November

3 Tuesday Board Meeting
3 Tuesday Contractual Issues Relating to Acquisitions and Divestments
3 Tuesday Principles of Contract Drafting and Interpretation
4-5 Wednesday Evaluation of Canadian Oil and Gas Properties for Landmen
4 Wednesday British Columbia Land Sale
4 Wednesday Manitoba Land Sale
4 Wednesday Fiduciary Duties
10 Tuesday Aboriginal Affairs
10 Tuesday Indian Oil & Gas Canada
11 Wednesday Remembrance Day
17 Tuesday 2007 CAPL Operating Procedure
18-19 Wednesday-Thursday Enhancing Strategic Perspective
18 Wednesday Alberta Land Sale
18 Wednesday Professional Ethics: Theory and Application
19 Thursday Advanced Surface Rights
19 Thursday General Meeting
25 Wednesday Royalty Agreements
24-25 Tuesday-Thursday Geology
26 Thursday Drilling and Production Operations (continues Dec. 1)

December

1 Tuesday Drilling and Production Operations (continues from Dec. 1)
1 Tuesday Saskatchewan Land Sale
1 Tuesday Board Meeting
2 Wednesday Alberta Land Sale
2 Wednesday Directive 056: AER Energy Development Applications Public Consultation Requirements (PSL®)
3 Thursday Preparing for a Surface Rights Board Hearing (PSL®)
8 Tuesday Negotiation Skills for Surface Land Agents (PSL®)
9 Wednesday British Columbia Land Sale
16 Wednesday Alberta Land Sale
24 Thursday Christmas Eve
25 Friday Christmas Day
26 Saturday Boxing Day
31 Thursday New Year’s Eve
WESTERN CANADA
LAND SALE & DRILLING RIG REVIEW

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NOTE: Numbers are rounded

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Peter Drucker

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