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THE LEGAL FRAMEWORK FOR FINANCIAL INCENTIVES
TO THE CANADIAN MINING EXPLORATION INDUSTRY

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Thesis submitted to
the School of Graduate Studies and Research
in partial fulfillment of the requirements
for the L.L.M. degree

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UNIVERSITÉ D'OTTAWA
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ABSTRACT OF
THE LEGAL FRAMEWORK FOR FINANCIAL INCENTIVES
TO THE CANADIAN MINING EXPLORATION INDUSTRY

There are a wide variety of government financial incentives currently made available to the Canadian mining exploration industry. The focus of this study is on the legal framework associated with those financial incentives of the tax deduction and grant types. After a brief discussion of some distinctive characteristics of the Canadian mining sector intended to assist the reader in his or her understanding of the incentives the sector attracts, the paper opens with a description of the tax system in Canada, and some of the federal and provincial tax deductions and allowances which stimulate mineral exploration. Then, a more thorough examination of the federal Income Tax Act flow-through share provisions is undertaken, paying particular attention to how the Canadian Exploration Expense (CEE) and Mining Exploration Depletion Allowance (MEDA) deductions combine with the flow-through provisions to produce a strong catalyst for individuals and companies to incur mining exploration expenditures. The history, operation, administration, impact and future of this popular incentive are described.

In the second part of the paper, several mining exploration grant programs available in 1987 are set out. Because of its seniority and relatively high profile, the Ontario Mineral Exploration Program is the keynote grant initiative discussed in this part, although comparative descriptions of British Columbia, Quebec and Yukon grant programs are also provided. Then, the new federal Canadian Exploration Incentives Program (CEIP) is examined. According to available information, CEIP is intended to be a non-tax replacement for the combined CEE-MEDA flow-through

incentive currently provided through the tax system. Details concerning CEIP were sketchy at the time of writing because the program was only announced May 3, 1988 and as yet no draft statute or regulations have been tabled. Analysis of the projected operation of the program is set out using an existing federal petroleum exploration incentive upon which CEIP is supposed to be patterned as a basis.

Following this, legal analysis of the tax and grant incentives examined in Parts One and Two of the paper is provided. First, an attempt is made to describe the legal character of tax and grant incentives. It is observed that the coercive, unilateral aspects of the tax system help explain the detailed legal and administrative structure attached to both its collection and distribution (i.e., incentive) functions. On the other hand, grants are characterized here as non-coercive and bilateral in nature: the suggestion is made that because grants are voluntary and consensual in nature, they do not attract the legal/procedural attention commonly associated with tax systems. In an effort to determine the types of obligations and duties flowing between parties to a grant agreement, comparisons are made with the private law instruments of gifts, trusts and contracts. As well, the possibility that grants are a new type of legal instrument, with its own peculiar characteristics is explored.

Next, the potential application of the doctrine of procedural fairness to tax incentive and grant administration is discussed. The problems caused by traditional (and not entirely appropriate) classifications of legal interests into "rights and obligations" are described. It is observed that those incentives awarded on a

discretionary basis seem less likely to attract useful procedural safeguards such as rights to receive reasons for a decision and to respond to those reasons. Generally, tax incentives surveyed in this paper operated on a more automatic, structured basis than did the grants examined, although the new Canadian Exploration Incentive Program (which is a grant initiative) is intended to operate in a similar manner to tax incentives and be available as an entitlement upon fulfillment of certain conditions. Due to the paucity of Canadian court decisions concerning tax incentive and grant administration, court cases involving analogous situations such as the awarding of licences, tenders for government contracts and withdrawal of benefits are analyzed. On the basis of this analysis, it would appear that, in the absence of statutory language of entitlement or evidence of improper fettering of discretion through guidelines, Canadian courts are hesitant to attach useful procedural protections to the awarding aspects of incentive administration. On the other hand, in cases of withdrawal of benefits, courts appear to be more willing to intervene and impose procedural safeguards on the process.

The possible relevance of the Canadian Bill of Rights and Canadian Charter of Rights and Freedoms to incentive administration is discussed. Two obstacles which impede their application are the rights- (as opposed to interests-) oriented language of the legislation, and the limited application to corporations. Sections 7 and 15 of the Charter may prove the most fruitful avenues for litigants.

The relative advantages and disadvantages of the two forms of incentive, from a legal perspective, are discussed. Generally, there appears to be no insurmountable obstacles preventing

virtually inter-changeable tax incentive and grant programs: in fact, the decision of the federal government to switch from a tax-based flow-through share exploration incentive to a grant program is evidence of just how similar in function the two forms of incentive can be. The characteristic which most distinguishes grants from tax incentives is the relative invisibility of tax expenditures when compared with grants: because tax deductions are revenue foregone they are a less obvious form of government assistance than grants. Grant programs require annual legislative appropriations and thus have ceilings on the amount that can be distributed, and tax deductions do not (at present).

The paper closes with a discussion of what legal reforms might be undertaken, and how they might proceed. It is observed that a reactive let's-wait-for-the-courts-to-pronounce-upon-it approach is likely to lead to piecemeal, and not necessarily rational and consistent reform. In light of this, the idea of model incentive legislation is put forward, to be available as an example for legislators in the future. Eventually, a generic incentive procedure statute could be introduced.

Foreword

In 1983, while working as a research consultant to the Law Reform Commission of Canada on a study of the federal Environmental Protection Service, I became aware of the pervasive use by the federal government of financial incentives to achieve policy objectives. In the environmental context, the two major incentives which I examined were "The Pulp and Paper Modernization Program", a federal-provincial grant initiative in which participating governments paid 25% of the costs of mill modernizations if those modernizations complied with certain pre-established criteria, and an "Accelerated Capital Cost Allowance" tax subsidy for purchases of pollution abatement equipment. Although at the time it was only possible to conduct preliminary research into the subject, my initial reaction was to be struck by the lack of coherent and consistent legal treatment of financial incentives, and the apparent lack of recognition of the importance of this subject by the Canadian legal community and the general public: why was it that some financial incentive programs attracted a relatively comprehensive legislative framework, while others operated with no greater legislative authority than a vote in a schedule to an appropriation act? What was the legal nature of a financial incentive? Was it a gift, a trust, a type of contract, or some entirely new instrument? What procedural protections did an applicant or recipient have? I was surprised to learn that there had been very little written on this topic in Canada.

Shortly thereafter, I began the Masters of Law program at the University of Ottawa, where I endeavoured to further my understanding of the subject. In fulfilling the course component

of the Masters program, I prepared three papers which examined a variety of financial incentives and legal issues associated with their use (for titles, see Bibliography at end of paper). In addition, and as an offshoot of this work, I presented a paper concerning the Ontario Mineral Exploration Program at the annual convention of the Quebec Prospectors Association (title in Bibliography). This thesis draws substantially on the completed material.

I would like to express my deep appreciation to my thesis supervisor, Professor Jean-Paul Lacasse of the Faculty of Law at the University of Ottawa, whose knowledge of and enthusiasm for study of legal issues associated with the resource sector is equalled only by his patience in imparting that knowledge and enthusiasm. In addition, I would like to thank the various other professors too numerous to name at the Faculty for their assistance with my work. As well, I would like to express my gratitude to the many government officials at both the federal and provincial levels who provided me with detailed information concerning incentive programs operating in their jurisdictions (see Bibliography for partial list of government officials consulted). Finally, I would like to thank Mr. John Frecker for his expert computer/word-processing assistance.

K.R.W.
May, 1988

Table of Abbreviations

- AMEP -- Accelerated Mine Exploration Program (British Columbia grant)
- CDE -- Canadian Development Expenses (tax)
- CEDIP -- Canadian Exploration and Development Incentives Program (federal grant)
- CEE -- Canadian Exploration Expenses (tax)
- CEIP -- Canadian Exploration Incentives Program (federal grant)
- DIAND -- Department of Indian Affairs and Northern Development (federal department)
- EIP -- Exploration Incentives Program (Yukon grant)
- EMPR -- Energy, Mines and Petroleum Resources (British Columbia department)
- EMR -- Energy, Mines and Resources (federal department)
- FAME -- Financial Assistance for Mineral Exploration (British Columbia grant)
- GPP -- Gaspesie Prospectors Program (federal-Quebec grant)
- MDA -- Mineral Development Agreements (federal-provincial)
- MEDA -- Mining Exploration Depletion Allowance (tax)
- MEFAP -- Mining Exploration Financial Assistance Program (Quebec grant)
- MEIP -- Mineral Exploration Incentive Program (British Columbia grant)
- MNR -- Minister of National Revenue (federal)
- NEP -- National Energy Program (federal)
- ONEP -- Ontario Mineral Exploration Program (Ontario grant)
- OPSEU -- Ontario Public Service Employees Union
- PAP -- Prospectors Assistance Program (Yukon and British Columbia grant)
- PIP -- Petroleum Incentives Program (federal grant)

Introduction

A wide variety of government incentives are available to the Canadian mining industry, intended to encourage exploration, development and production of Canada's non-renewable mineral resources.¹ Among others, there are programs providing geological survey information,² subsidies reducing the cost of building access roads and supplying electricity to mine sites,³ programs to encourage investments by private interests in the mining sector through tax expenditures,⁴ financial aid to offset the costs of exploration,⁵ government assisted research and pilot projects testing new techniques and products intended to improve mineral exploration, development and production,⁶ financial assistance for mine modernizations which reduce energy consumption,⁷ government-private sector programs exploring the effects of mineral industry (and other sector's) pollutants on the environment⁸ and subsidies lowering the costs of mine pollution abatement.⁹

Given the extent and importance of financial incentives to the mining sector, it is somewhat surprising that, with the exception of tax-based initiatives, the legal framework for the administration of these incentives has received little attention in Canada. It may be that, to this point, problems have been largely resolved administratively, so that it has not been necessary to raise questions through and about the legal process. However, even if this has been the case, the potential for legal disputes is clearly evident: for example, disgruntled applicants who have had their application rejected or recipients unsatisfied with the amount of incentive received are just two possible scenarios which could lead to legal challenges of administrative decisions with respect to the awarding of financial incentives.

Needless to say, it would be impossible to adequately describe and analyze the legal framework for all of the initiatives currently applicable to the mining sector here. Instead, in an effort to make a more manageable study, certain boundaries have been set. First, the paper only attempts to analyze the legal framework with respect to *financial* incentives; hence, the legal structure surrounding the operation of non-monetary *service* incentives, such as information initiatives (e.g., mineral inventories,¹⁰ technological advice programs,¹¹ geoscience services¹²) and training assistance (e.g., prospector,¹³ safety¹⁴ and rescue¹⁵ training) will not be discussed here. This should in no way be taken as a denigration of the value of such services; in fact, success in the mineral sector depends very highly on the provision of these types of services.¹⁶

By *financial* incentives, the writer also wishes to indicate his intention to address only those programs which involve a *positive* act of supplying funds to a private individual or firm, or forbearance from collecting revenue from that individual or firm which would otherwise be forthcoming. Thus, for example, following this definition, programs which use grants or tax expenditures would be considered *financial* incentive programs, because of their positive financial assistance character. On the other hand, legislation establishing an offence or offences for certain behaviour, which upon conviction could lead to an individual or firm being the subject of a fine, would not here be classified as a financial incentive program. Although it could be argued that the possibility of a penalty being levied is a monetary inducement to change behaviour, it is not a *positive* act of financing to encourage certain activities, and so will not, for

the purposes of this paper, be considered a financial incentive.

The scope of the paper is further limited by its exclusive focus on financial incentives pertaining to the exploration phase of mining. The term "exploration", as used here, is intended to refer to those activities undertaken for determining the existence, location, extent or quality of a mineral resource in Canada, including prospecting, preliminary drilling, surveying, trenching, test pitting and sampling.¹⁷ Moreover, only those incentives directed toward exploration of conventional minerals (i.e. base or precious metal deposits and coal deposits), and not "industrial" minerals such as asbestos, gravel, sand and graphite will be discussed in the paper, because of the differences in incentives these types of minerals attract. As well, the paper examines only those financial incentives which were available as of 1987 (although it also surveys new developments up to May 3, 1988).

The general issue of the propriety of financial incentives applied to the mineral sector as an instrument of policy implementation will not be discussed here. In this paper, the position adopted is that, regardless of their merits, the use of financial incentives is widespread; in light of this reality, the immediate legal questions which need to be addressed are of a practical nature: basically, how do financial incentives to the Canadian mining sector currently operate, what is the legal framework associated with their use, and is this legal framework adequate? Stated more systematically, the paper attempts to address the following issues:

- (1) What legislative structures are currently used to establish financial incentive programs, and govern their day-

to-day operation?

- (2) Are these existing legislative structures adequate?
- (3) If not, what are the inadequacies, and what can be done about them?
- (4) What legal obligations and duties do government authorities have in the establishment and administration of financial incentive programs?
- (5) Are the current set of legal obligations and duties of government adequate?
- (6) If not, what are the inadequacies, and what can be done about them?
- (7) Why do legislators choose a particular form of financial incentive over the other available types (e.g., a tax deduction as opposed to a grant program)? Are there distinctive characteristics of incentives which are exclusively associated with that type of incentive?

As used here, the term "legal framework" consists of the legislative structure for financial incentives, the legal obligations and duties of government authorities responsible for administering those incentives, and the legal remedies available to unsatisfied persons, combined. It is fully recognized, however, that in practice the three components of the legal framework identified here may overlap substantially. Thus, for example, legislation establishing a financial incentive program may describe the operation of that program, set out responsibilities and obligations of government officials, and provide remedies for unsatisfied parties involved in the administration process. It is submitted, however, that even in such a case, it would be wrong to

limit analysis of that program to the legislation which establishes it, because determination of the legal nature and obligations of incentives frequently necessitates looking beyond the immediate statute or regulation in question, making use of, for example, such doctrines as natural justice and procedural fairness.

The key evaluative criterion employed in the aforementioned list of questions to be discussed in the paper is *adequacy*; that is, is the legislative structure adequate and are the obligations and duties attached to government authorities adequate? The content of the definition of adequacy is not the same in each of these questions. As a starting point, it is suggested that any analysis of the adequacy of a legal framework should address values such as those set out in the Law Reform Commission of Canada's work concerning independent administrative agencies.¹⁸ In the Commission's work, it was considered that the processes through which independent administrative agencies make decisions should reflect an appropriate blend of the following values: accountability,¹⁹ authoritativeness,²⁰ comprehensibility,²¹ effectiveness, economy and efficiency,²² fairness,²³ integrity,²⁴ openness,²⁵ and principled decision making.²⁶ As the Commission states in its Report to Parliament 26, *Independent Administrative Agencies*,

These values tend to overlap and reinforce each other. In some instances, to stress one may underplay another. In any given context some may be more important to observe than others. While the appropriate blend necessitates an element of political choice, these values should all be accommodated within the overall legal and operational framework for agency decision making. It must be emphasized that agencies do not make decisions merely to resolve private disputes. They must also advance the public interest, having due regard for private interests, in a way that will promote optimal

voluntary compliance with the policy that is adopted. The values reflected in a process have a significant bearing on whether or not that goal is achieved.²⁷

Because the Law Reform Commission's criteria were formulated with decision-making of *independent administrative bodies* in mind, whereas the focus of discussion in this paper is the legal framework of different types of financial incentives, the Commission's criteria are not entirely appropriate in the context of this paper. As a result, the criteria need to be adjusted somewhat to be relevant to discussion here:

(1) *accountability and authoritativeness*: Both of these values are particularly suited to questions of independent administrative bodies, but there are important issues involving these values associated with the legal framework for the administration of financial incentives. For example, are certain types of financial incentives subject to a legal framework more conducive to political, judicial and public accountability than others? If so, why? Are administrators' decisions appealable by all parties to the process?

(2) *comprehensiveness*: how thorough is the legal framework associated with administration of a financial incentive? Are the criteria used to determine awards of incentives clearly articulated? Are the rights and remedies of parties set out?

(3) *effectiveness*: thorough assessments of how well financial incentives achieve their policy objectives are beyond the scope of this paper; however, discussion of available data indicating impact of incentives is undertaken wherever possible.

(4) *economy and efficiency*: on the basis of available data, are certain types of incentives quicker and less expensive to

implement than others?

(5) *fairness*: legal notions of "natural justice", "procedural fairness", and "fundamental justice" and their application to financial incentives are discussed.

(6) *integrity*: on the basis of available information, how does the private sector perceive financial incentives, their administrators and the associated legal frameworks?

(7) *openness*: is financial incentive administration conducted in a way which is visible and understandable by the private sector, or is it shrouded in secrecy?

(8) *principled decision-making*: can the behaviour of administrators be reasonably anticipated and is that behaviour accepted as providing equitable treatment to all persons concerned?

Throughout the paper, the aforementioned values will be referred to for the purposes of testing the adequacy of the legal framework with respect to particular financial incentive programs.

The research methodology for this paper was as follows: first, primary sources such as legislation, regulations and court decisions were used to identify the law most obviously relevant to mining sector financial incentives. Then, secondary sources such as articles, books and government publications were consulted, in an effort to ensure as comprehensive a survey of incentive types as possible. Next, an attempt was made to contact government representatives in all relevant jurisdictions to confirm the accuracy of the information obtained to that point, and to follow up on any matters where more detailed information was needed. Upon completion of this preliminary research, it was

possible to tentatively categorize financial incentives in two ways: by function and by form.

With respect to the functional categorization, it was observed that certain incentives were designed to encourage the non-mining component of the private sector to invest in various aspects of the mining sector: the most notable example of this type of incentive is perhaps the income tax exploration and development deduction system in general, and more particularly the "flow-through share" financing arrangements currently provided by income tax legislation. Other incentives were directed more specifically at the mining sector itself, and tended to encourage certain types of behaviour, e.g., to explore in certain regions. From a legal-formal perspective, the incentives could essentially be divided into two major types: direct spending programs, such as grants, and indirect initiatives, such as tax expenditures. However, the distinctions here were not clear-cut: for example, the Ontario Mineral Exploration Program operates using both the grant and tax credit forms. There appeared to be no necessary correlation between function and form, although those initiatives which encouraged the non-mining component of the private sector to invest in the mining industry appeared to be primarily of the tax variety.

Because the form and substance of incentives depends significantly on peculiar characteristics of the Canadian mining sector, the paper begins with a brief discussion of mining in Canada, including a summary of the variety of different actors involved in mining, the different processes of mining, and the economics of mining in Canada.

Beginning with the actors, the Canadian mining industry consists primarily of two fairly distinct groups: the "majors" (also known as the "seniors"), and the "juniors". Majors are those companies with both production and exploration components. These larger companies are typically capable of offsetting much of their costs of exploration against revenue from production, pursuant to certain income tax provisions described later in the paper. They are also characteristically more conservative than their smaller counterparts.²⁸ Seniors may have access to capital-raising opportunities (i.e. issuing of preferred shares, bonds, debentures, etc.) which are generally not available to many smaller companies.²⁹ Juniors, in contrast, are usually smaller operations, engaged solely in exploration. Juniors usually have more limited tax and financing options when compared with seniors.³⁰ A third potentially important set of actors are investors, particularly those individuals who have an excess of income/capital which will be subject to tax at a high rate unless an appropriate tax shelter or deduction arrangement can be found. It will be seen that certain grant and tax programs are specifically designed to encourage the involvement of investors.

The processes which taken together comprise "mining" vary dramatically depending upon the mineral involved. Generally, mining consists of the basic categories of exploration, development and production. Gold mining -- from prospecting through extraction -- can in certain cases be carried out by one and two man operations.³¹ Other mineral types require expensive and extensive surveying before they can be located, and then extraction and processing are technically difficult, labour intensive and costly.

Mining is inherently a high risk venture, given the low likelihood of discovering marketable quantities,³² the high cost of extraction,³³ the fluctuating market prices of minerals, and the finite nature of natural resources;³⁴ in recognition of these factors, Canadian governments have offered certain financial incentives (both tax and grant types) to the mining sector, which have the effect of lessening the risk associated with the activity.

Stimulation of mining activity is attractive to the federal and provincial governments for a variety of reasons. First, mining frequently takes place in outlying regions, areas which in Canada are often economically disadvantaged.³⁵ Mining ventures in these areas can have a significant financial and employment impact. Second, mining activity has important "multiplier" economic effects. Discovery of commercial quantities of a mineral can lead not only to increased exploration in the surrounding region, but also to greater extraction, processing and post-processing activities. In turn, the influx of labour and capital associated with such activity can stimulate demand for other services in the region. Certain financial incentive programs are designed to encourage exploration and development in areas of regional disparity.³⁶

A final characteristic of the mining industry which is relevant to an understanding of the incentives it attracts is its tendency to be cyclical; that is, the price of a particular mineral may fluctuate dramatically over a relatively short period of time. Some financial incentives could be described as a "shot in the arm", a catalyst for activity when the current economic

situation would seem to dictate a "go-slow" attitude by the private sector.³⁷

Part One of the paper is devoted to a description of the tax system generally, and more specifically those provisions which act as an incentive to engage in mining exploration activity.

Because all financial incentive programs available to the mining sector, regardless of their form, operate in relation to income tax legislation the basic tax regime applicable to the mining industry is briefly summarized. Then, short descriptions of the major tax incentives available to the mining sector are provided, as a prelude to a more in-depth examination of the flow-share financing arrangements currently available pursuant to the federal Income Tax Act.³⁸ The history of the provisions, their operation, impact, administration and enforcement aspects, and their future are all surveyed.

In Part Two of the paper, the grant programs currently provided³⁹ to encourage mining exploration are examined. The keynote grant initiative discussed is the Ontario Mineral Exploration Program (OMEP). The OMEP initiative is compared and contrasted with several other grant exploration programs available in Canada, including the Quebec Mining Exploration Financial Assistance Program,⁴⁰ the British Columbia Financial Assistance for Mineral Exploration Program, and the Yukon Exploration Incentives Program. A short description of the recently announced⁴¹ Canadian Exploration Incentives Program is also given.

Legal analysis of incentive programs is provided in Part Three of the paper. Discussion includes a critical examination of the legal nature of incentives in light of existing jurisprudence,

and the practical consequences of legal characterization, administrative discretion in the awarding of incentives, the application of procedural fairness to financial incentive administration, and the potential relevance of the Charter of Rights and Freedoms⁴² to incentive operation. Wherever possible, comparative references are made to the legal situations in other jurisdictions.

At this point, the reader will have been exposed to description and analysis of both tax and direct expenditure (grant) programs designed to encourage mineral exploration. Using the mining exploration incentive programs discussed in the paper as a starting point, the advantages and disadvantages of the two forms of incentives are outlined.

Finally, the paper closes with conclusions which summarize the major observations made in the paper and the implications of these observations on future development of financial incentives in Canada. The case for reform of the legal framework for the administration of financial incentives is put forward.

Part One: Tax Incentives to Encourage Canadian Mining Exploration

Introduction

No matter whether financial incentives take the form of grants, loans or tax deductions, they all operate in relation to the tax structure. In this section of the paper, the tax context in which the mining industry operates is briefly summarized as an introduction to more detailed discussion of tax provisions of particular relevance to mining exploration.

Profits from the Canadian mining sector are generally subject to three levels of taxation: federal income tax, provincial income tax,⁴³ and a provincial tax, royalty fee or levy on production profits or revenue.⁴⁴ The method of operation, terminology and substance of incentives offered varies significantly from one tax regime to another. Below, a brief description of some of the tax incentives available for exploration is provided. A short discussion of the tax treatment of grants is set out. Following this, a more in-depth examination of a particularly important tax initiative for encouraging exploration, the flow-through share mechanism, is undertaken.

I. General Overview

A. Federal Income Tax Incentives

In Canada, tax regimes function basically as follows: once gross income from all sources has been calculated, then certain deductions are subtracted.⁴⁵ Deductions provided under the federal income tax regime and available to the mining sector include those

for exploration,⁴⁶ preproduction and development expenses,⁴⁷ capital cost allowances (depreciation at varying rates),⁴⁸ ordinary business and operating losses,⁴⁹ resource allowances,⁵⁰ inventory allowances⁵¹ and various earned depletion allowances⁵² including a mining exploration depletion allowance.⁵³

Because several of these deductions could be characterised as incentives designed to encourage exploration activity, they will be briefly summarized here. First, "Canadian exploration expenses" (CEE), defined to include costs associated with prospecting, geological, geophysical or geochemical surveys, drilling, removal of overburden, and sinking a mining shaft⁵⁴ can, in most cases be fully deducted from taxable income.⁵⁵ For purposes of the Income Tax Act, a taxpayer does not directly deduct CEE. Instead, these expenses are credited to a "Cumulative Canadian exploration expense"⁵⁶ account. Then, deductions from this cumulative account are permitted.⁵⁷

Canadian development expenses (CDE) are basically those costs or expenses incurred for the purpose of bringing a mineral resource into production and incurred prior to the commencement of production from the resource in reasonable commercial quantities, including clearing, removing overburden and stripping, and sinking a mine shaft, constructing an adit or other underground entry, the cost to him of any resource property or any right to or interest in such property.⁵⁸ As with CEE, CDE costs are pooled in an account⁵⁹ but, in contrast with the 100% deduction possible for CEE, Canadian development expenses are deductible at only a 30% rate.⁶⁰

The "resource allowance" is another tax deduction which can

be considered an incentive to incur exploration and development expenses.⁶¹ The deduction for the resource allowance is equal to 25% of "resource profits", which are defined in the regulations to include income from the primary production of minerals, the production of Canadian petroleum, natural gas and related hydrocarbons, the processing of ore from Canadian mines, and royalties from oil or gas wells or mining operations in Canada.⁶² The fact that resource profits are calculated before deducting Canadian exploration and development expenses has important tax consequences:

"[t]he result of being able to deduct such exploration and development expenses after computing resource profits is that exploration and development expenses create a tax shield at a rate which is higher than the effective tax rate applicable to resource profits....Conceivably, in circumstances where a taxpayer has incurred substantial exploration and development expenses, incurring such expenses could reduce taxable income to nil, even though he reports a higher amount of pre-tax profits for accounting purposes...."⁶³

Clearly, the attractiveness of the deduction for the resource allowance is dependent upon their being significant resource income to offset.

The other federal tax deduction which acts as a major incentive for mining exploration is the mining exploration depletion allowance (MEDA).⁶⁴ Unlike the resource allowance, MEDA can be used to advantage by non-resource producing taxpayers. Available since April 19, 1983 (and applying to exploration expenses incurred since that time),⁶⁵ this depletion allowance is a special bonus deduction of up to 33 1/3% in addition to the 100% write-off provided for Canadian exploration expenses. The allowance basically operates as follows: a taxpayer may deduct the balance of his "mining exploration depletion base" as long as

the base is not greater than 25% of his income.⁶⁶ The "mining exploration depletion base" is essentially one third of "grass roots" exploration expenses.⁶⁷ Thus, a taxpayer who incurs the qualifying type of exploration expenses is entitled to a 100% deduction for CEE plus the 33 1/3% mining exploration depletion allowance for a total deduction of 133 1/3%. A key feature of MEDA is that it is a deduction from any income source, not just from resource activities; thus, the deduction is available to non-resource taxpayers who invest in the mining sector. The introduction of the mining exploration depletion allowance was a pivotal development in the popularisation of the flow-through share financing vehicle as it applies to the mining sector. Flow-through share financing is discussed in greater detail in the next section.

B. Provincial Tax Incentives

Provincial income tax incentives, where they exist, often closely resemble those contained in the federal Income Tax Act. For example, as with the federal regime, the Quebec Taxation Act⁶⁸ provides deductions for "Canadian exploration expenses"⁶⁹, makes use of the concept of a "Cumulative Canadian expense" account⁷⁰, and has a depletion allowance.⁷¹ From 1980 through 1986, the Quebec income tax system provided through its Quebec Exploration Account a 66 2/3% bonus deduction in addition to a 100% CEE write off in computing income subject to provincial income taxation.⁷² This "double depletion" deduction was reduced in the fall of 1986 to 33 1/3%.⁷³ In effect, the Quebec depletion initiative is identical to the federal "mining exploration depletion allowance", except that it applies only to exploration expenses incurred in Quebec. In other provinces, the federal deduction applies for

provincial tax which is computed as a percentage of federal tax payable.

As was mentioned earlier, in addition to federal and provincial income tax, mining operations are subject to an additional provincial levy which has been variously described as a mining "royalty" or "duty" but which amounts to a third level of taxation specifically and exclusively directed at the resource sector. Exploration incentives exist at this third level as well. For example, in British Columbia, pursuant to s. 2 (1) of the Mineral Resource Tax Act,⁷⁴ every mine operator is required to pay a tax of 17.5% of his income derived during the fiscal year from the operation of the mine. However, certain deductions are permitted. In computing deductions, the Mineral Resource Tax Act draws expressly upon the concepts and mechanics of deductions contained in the federal Income Tax Act⁷⁵: a deduction is permitted for exploration expenses (except that those expenses must be incurred for exploration undertaken in B.C.)⁷⁶, and an earned depletion allowance is available⁷⁷ which can reduce after-tax costs of exploration for a taxable producer to eight cents on the dollar.⁷⁸ Similarly, in New Brunswick, pursuant to the Metallic Minerals Tax Act⁷⁹, a taxable producer can claim a 150% deduction on account of expenses incurred for exploration in the province.⁸⁰

In summary, it can be seen that the tax incentives intended to encourage mining exploration are of primary attraction to resource producers, who will have the resource income against which the deductions can be offset. The most important exception to this observation is the mining exploration depletion allowance, which can be used to offset income from any source.

C. Tax Treatment of Grants

With respect to mining exploration, non-tax financial incentives such as grants operate independently from the tax system, but their existence is usually explicitly taken into account in tax legislation. Paragraph 12 (1)(x) of the federal Income Tax Act provides that ...

...any amount...received by the taxpayer in the year, in the course of earning income from a business or property, from ... a government, municipality or other public authority where the amount can reasonably be considered to have been received as an inducement, whether as a grant, subsidy, forgivable loan, deduction from tax, allowance or any other form of inducement, ...to the extent that the amount was not otherwise included in computing the taxpayer's income for the year or a preceding year....

.... shall be included as income from business or property.

According to Michel Roy, author of the article "Conséquences fiscale de l'aide gouvernementale".⁸¹ s. 12(1)(x) of the Income Tax Act is a "basket clause" to be used as a last resort, when a more explicit provision setting out tax treatment of grants is not set out elsewhere.⁸² An example of a more explicit provision detailing ~~tax~~ treatment of exploration grants is s. 66.1(6)(b)(ix) of the Income Tax Act which, in its description of "cumulative Canadian exploration expense" specifically factors in

....any assistance that a taxpayer has received or is entitled to receive in respect of any Canadian exploration expense incurred after 1980...to the extent that the assistance has not reduced his Canadian exploration expense....

"Assistance" is defined as any amount, other than a prescribed amount, received or receivable at any time from a person or government, municipality or other public authority whether such amount is by way of a grant, subsidy, rebate, forgivable loan,

deduction from royalty or tax, rebate of royalty or tax, investment allowance or any other form of assistance or benefit.⁸³ According to case law, a taxpayer is "entitled to receive" assistance when all collection conditions are met, including ancillary conditions such as filing an audit report or a request for payment.⁸⁴ Roy states that tax treatment of non-tax resource assistance involves the concepts of benefit, reasonable relationship between the assistance or benefit and the expense, and reduction of royalties.⁸⁵

Similarly, provincial tax legislation also expressly recognizes the existence of other "assistance"; for example, s. 397 of the Quebec Taxation Act states that ...

...where a taxpayer has received or is entitled to receive ...assistance or benefit from a government, municipality or other public body in respect of his Canadian exploration expenses, whether as a grant, bonus, forgivable loan, deduction from royalty or tax, investment allowance or any other form of assistance or benefit...

...the amounts of money received should not reduce the calculation of Canadian exploration expenses under the Act; then, as with the federal Income Tax Act, the assistance is deducted in the calculation of the Cumulative CEE account.⁸⁶ Nevertheless, although much tax legislation recognizes and takes into account the existence of other assistance, there is not uniform and consistent treatment from one jurisdiction to another.⁸⁷ Despite efforts to "harmonize" federal, provincial and territorial mining legislation, total uniformity has not been achieved.⁸⁸

II. Flow-Through Shares

A. Overview

The lengthy and technical definition of "Canadian exploration expenses to flow-through shareholder" provided by 1986 amendments to the Income Tax Act⁸⁹ could be condensed and simplified to the following: where a person has given consideration under an agreement to a corporation for the issue of a flow-through share of the corporation and the corporation has incurred Canadian exploration expenses, the corporation may renounce to the person in respect of the share the amount, if any, of any tax deductions that, but for the renunciation, that corporation has received or is entitled to receive. This attempt at condensation and simplification is inadequate in several respects: at one and the same time it remains very long-winded and technical, misses many of the intricacies of the flow-through share issue, and doesn't acknowledge that the form, substance and objective of flow-through shares has changed significantly over time. The foregoing attempt at concision and simplicity, however unsuccessful, illustrates the difficulty inherent in any effort intended to reduce discussion of flow-through shares to an easily understandable essence. In this section of the paper, an effort is made to explain the form and operation of the flow-through share financing vehicle thoroughly and accurately, but without descending to the level of detail associated with a paper intended for tax practitioners or investment analysts.

Flow-through shares have been defined in more colloquial language as "an interest acquired in a mining venture in which the tax deductions resulting from the expenditures of the invested

funds are attributed (or "flow-through") to the original investor on whose behalf the activity is undertaken."⁹⁰ The attractiveness to investors of flow-through shares issued by mining corporations can be explained by a number of factors. The use of flow-through share financing offers taxpayers in a high tax bracket with an excess of income an opportunity to shelter or invest that excess of income with favorable tax consequences in an activity which the federal government has chosen to encourage through generous tax deductions as is the case with Canadian mining exploration⁹¹. If mining companies were to use their own capital to engage in exploration activities, they would be entitled to deduct their qualifying expenses against the income tax otherwise payable by them. Where the mining companies use capital provided by investors, the tax deductions which would otherwise be available to the mining companies instead flow-through to apply to the investors income.

Two reasons why many mining companies are willing to transfer the tax benefits associated with mining exploration to third parties are first that the companies in question need immediate inputs of capital (and thus the prospect of a future deduction in tax, even if it be as generous in amount as a 133 % deduction, may not be as attractive as money up front), and second, many mining companies (particularly juniors) may not be in a position (if they are ever in a position) to take advantage of the tax deductions available to them for a considerable number of years (e.g, when they have income to offset).

From the perspective of the investors, the flow-through shares of the company they receive in consideration for their

investment provide them with an attractive deduction which can be used against their remaining taxable income. Flow-through shares can later be liquidated (sometimes within weeks of the closing of the issue)⁹² and the money received for them will in most circumstances be treated as a capital gain⁹³ (i.e., subject to a more favorable tax treatment, as only one half of the gain is included in income). To provide the reader with an idea of how attractive flow-through share offerings are to the investment community, the premiums for the sale of some shares have been up to 100% over and above the shares' market value.⁹⁴

It should be noted, however, that investors are assuming several risks when they purchase flow-through shares: first, that the price of the shares will not fall dramatically between the time of buying and selling so that the amount received on sale will not be worth the investment;⁹⁵ second, investors are assuming that the expenditures undertaken will qualify as Canadian exploration expenses under the Income Tax Act;⁹⁶ and third, until 1986, due to the principal-agency relationship which was necessary to structure flow-through shares, investors could be held liable for any damages caused by the exploring corporation.⁹⁷ There are a number of techniques which have been used to minimize the risk as far as possible.⁹⁸ Judging by the popularity of flow-through share offerings in the past several years, the risk factor has not been a significant concern to many investors.⁹⁹

In this part of the paper, the history of the development of the flow-through share is set out, then the legal framework establishing the incentive is analyzed. Following this, the administrative and enforcement structure applying to flow-through share operation is discussed. Next, the monetary impact of flow-

through shares on the mining sector is described. Finally, the future of the incentive is discussed.

B. History

The use of flow-through shares in the mining industry has a comparatively long history, dating back to the 1950s.¹⁰⁰ However, it has only been since about 1976, as a consequence of a number of changes to the tax system, that the flow-through share vehicle has been used by the resource sector as a method of raising capital from the public, and its particular attractiveness in mining circles is a phenomenon of the early 1980s. The story of its evolution from a relatively low-profile provision usually applying to exploration carried on by senior resource companies in relation to juniors to its lofty position as a major investment vehicle for mining exploration in Canada ~~apply~~ demonstrate how the scope and intended beneficiaries as well as the mechanics of tax incentives can change over time.¹⁰¹

In the 1950s, there was apparently uncertainty in the mining industry and in the Ministry of National Revenue about the deductibility of exploration expenses incurred by one mining company in exchange for shares of another mining company (usually on whose property the exploration took place).¹⁰² In 1955, section 83A of the Income Tax Act was added to (among other things) clarify that; *where the shareholder actually incurred the exploration expenses*, that shareholder was entitled to deduct the exploration expenses against his income,¹⁰³ even though it was the issuing company which was the beneficiary of the exploration activity. According to tax commentators Dent and Jakolev, this

provision was "primarily applied by major mining companies carrying out exploration on properties owned by juniors."¹⁰⁴ Subsequently, in the 1966 case *Farmer's Mutual Petroleums Ltd. v. Ministry of National Revenue*¹⁰⁵ it was confirmed that taxpayers must actually conduct the exploration or development program giving rise to such expenses on his own account, or through the agency of a third party, in order to be able to deduct the exploration expenses. What is important to note for present purposes was that the provision as originally enacted and applied was addressing a common exploration arrangement used in the industry at the time, and did not anticipate the involvement of non-mining interest third parties (i.e., investors).

However, as time went on, and as the tax rules respecting exploration changed and the deductions available increased, the potential for flow-through shares arrangements to act as tax shelters and financing vehicles through third party investments was enhanced. The first major impediment to flow-through financing to be removed was the restrictive definition of exploration expense, which in 1972 was broadened to include an expense incurred in consideration for shares, applicable to all taxpayers.¹⁰⁶ However, there was little tax shelter-related flow-through share financing activity at that point, in part because the deductions available for exploration were still quite modest.¹⁰⁷ By 1976, the deductions provided for exploration had been increased to 100%, for expenses incurred after May 25, 1976.¹⁰⁸ In addition, in 1976, a new s. 66.1 (3) was added which allowed taxpayers to deduct the Canadian exploration expenses of others against their income in the year in which the expenses were incurred.¹⁰⁹

Still, however, obstacles remained. Subsection 66.3, added in 1976,¹¹⁰ required that shares issued after July 31, 1976 be deemed to be not capital but inventory of investors, acquired at nil cost. The effect of this provision was that the proceeds of shares at disposition would be taxed as income (i.e., at a higher rate than that applying to capital). Then, in 1981, the subsection was amended so that the proceeds upon disposition of shares earned after November 13, 1981 could be treated as income or capital: unless the investor could be considered a trader or dealer in securities and had acquired the shares as an adventure in the nature of trade, the shares would usually be treated as capital.¹¹¹ From at least 1976 on, the tax shelter potential of flow-shares to the resource industry for exploration has been recognized.¹¹² In particular, in the oil and gas sector, the flow-through share vehicle was used in the late 1970s, and then in the early 1980s in relation to the National Energy Program's Petroleum Incentives Program. As one commentator put it, "[f]low-through shares were no longer perceived as a method of participating in an exploration program, but as a means of selling tax deduction and PIP grants for cash."¹¹³ Given the wording of the Act at this point, it was necessary for investors and exploring corporations to take on the guise of principal and agent respectively, so that investor's agent would be actually incurring the expense (and thus meeting the now inappropriate requirements of the legislation, still carrying atavistic characteristics of its 1950s predecessors.¹¹⁴

The major impetus for use of flow-through shares in relation to mining exploration has been the additional incentive provided

by the enhanced earned depletion allowance (the mining exploration depletion), added in 1983, which, when combined with the 100% deduction for Canadian exploration expenses, has the effect of providing a 133% deduction for qualifying expenses.¹¹⁵ In April 19, 1983 budgetary papers accompanying the announcement of the mining depletion allowance, it was stated that "[t]his proposal will help the mining industry attract exploration financing and will be of particular benefit to junior mining companies."¹¹⁶ and indeed the addition of this provision triggered investments of hundreds of millions of dollars since then.¹¹⁷

Since 1983, a number of refinements to the legislation relating to flow-through share operations have been made, for the most part resulting in flow-through offerings becoming an even more attractive financing arrangement for mining interests and investment opportunity for taxpayers looking for shelter from high rates of income tax. In 1985, a \$500,000.00 "lifetime capital gains exemption" was announced¹¹⁸, which made disposition of flow-through shares more attractive from a tax perspective for many individuals.¹¹⁹ Other changes since 1983 include an expanded definition of Canadian exploration expense¹²⁰, and a carryback provision which allows expenditures incurred within 60 days after the end of a calendar year to be included in CEE of the previous year.¹²¹ In 1986, amendments to the Income Tax Act made it possible for investors to limit potential third party liability and avoid the somewhat tenuous principal-agency relationships between investors and corporations where corporations renounced their exploration expenses pursuant to certain specified agreements.¹²² Amendments introduced in 1986 also required that flow-through share offerings made after February, 1986 must be issued by

principal business corporations.¹²³

It can be seen, then, that the flow-through share provisions have undergone a remarkable transition from their original form in the 1950's. Whereas the flow-through share vehicle was initially used where the shareholders actually carried out the exploration, by the late 1970's a somewhat artificial principal-agency relationship was maintained between investors and corporations engaged in exploration so that the investors could receive the benefits of the deductions provided for qualifying exploration activities. The deductions available were increased, eventually the structuring of principal-agency relationships between investors and corporations was rendered unnecessary, and the transformation of the flow-through share provisions from a within-industry exploration arrangement to an investment tax shelter were complete. In 1987 and 1988, more changes to the flow-share provisions and exploration deductions were proposed. These are discussed infra.

C. Operation

As has been alluded to earlier, one difficulty associated with any attempt at describing flow-through share operations is their continually changing nature. Because the relevant Income Tax Act provisions have been amended on average about once a year since 1983, any description of the operation depends on which year's version is the subject of examination. For the purposes of discussion here, the emphasis will be on the current (1987) version, but references will be made to previous legislation and the arrangements it spawned where appropriate. A second problem with any effort intended to describe flow-through share

operations is that the possible arrangements which can be made pursuant to the legislation are virtually limitless.¹²⁴ What follows, then, is only a brief and sketchy overview of some of the main features of flow-through operation and the most common types of flow-through arrangements.

The 1986 amendments to the flow-through share provisions ushered in a more refined, straightforward and for some a more attractive investment vehicle than had previously been available. As was discussed in the History portion of the paper, *supra*, gone was the necessity to establish a principal-agency relationship between investors and exploring corporations, and this in turn all but eliminated the risk of tortious liability of the investors with respect to the actions of the exploration corporation.¹²⁵ Instead, pursuant to written agreements arranged beforehand between the parties and registered with the Minister, principal business corporations¹²⁶ (in consideration for funds supplied by investors) were obligated to incur Canadian exploration expenses¹²⁷ and then renounce them in favour of the investors. Provisions¹²⁸ in the Income Tax Act mandate several important terms of the agreements: expenses must be incurred within 24 months of the time of making the agreement, the expenses must be incurred in an amount at least equal to the consideration given for the shares, the amount of deduction renounced must not exceed that provided by the investor for the shares, and the renunciation must take place during the 24 month term of the agreement or within 30 days from the expiry of that agreement.

According to one commentator, the above-described new rules have facilitated the issue of single corporation flow-through shares, because investor exposure to tortious liability has been

removed.¹²⁹ On the other hand, it has been pointed out that the requirement that flow-through shares be issued by principal business corporations might create a bias in the minds of some investors in favour of the established majors (whose status as a principal business corporation is well known) and against the smaller operations (where the investors will have to exercise some diligence in determining the true nature of the corporation in question).¹³⁰ Moreover, with single corporation issues, the risk averse investor is assuming that on disposition the shares will not have substantially devaluated.¹³¹

Whereas previously, flow-through shares could only be issued after expenses had been incurred, this changed as a result of 1986 amendments so that shares can be issued any time after the agreement is reached and before the end of the prescribed period. As a consequence, now it is possible for an investor to receive full benefits associated with exploration deductions even though the corporation has not yet incurred the expenditures.¹³² The investor is taking the risk, however, that the expenditures the corporation eventually incurs will qualify as Canadian exploration expenses.

Prior to the 1986 amendments which removed the liability of investors for damages caused by their agent/corporations, a common method used by investors to attempt to lessen their potential tortious liability was the limited partnership form.¹³³ However, even with the liability problem rectified, the limited partnership vehicle has remained popular as a flow-through vehicle, because it offers other important advantages to investors. First, the costs of issuing partnership units (i.e., preparation and printing of

the offering material and selling costs) can usually be deducted by the investors.¹³⁴ Second, unlike a single corporation share issue, partnerships can be used to purchase several issues, thus allowing diversification of the portfolio and decreasing the risk-exposure associated with investors who have all their money tied to a single issue. One commentator has summarized how a particular variation of the limited partnership vehicle might operate:

If there are up to say, five companies whose shares are being pooled, one approach has been the utilization of a limited partnership. This limited partnership then purchases flow-through shares of the mining corporations and flows out the tax advantages (CEE and MEDA) to the limited partners. The partnership is later dissolved pursuant to subsection 98 (3) of the Act and the limited partners receive an undivided interest in all of the assets of the partnership. Thereafter, each limited partner exchanges his undivided interests in the shares of each particular company for shares not subject to co-ownership, pursuant to subsection 85(1) of the Act. The attractiveness of this structure, from an investor's point of view, is that a choice can be made to dispose of any of the underlying shares at different times without being forced to sell the basket of shares at the same time.....¹³⁵

Apparently, the Department of Finance has indicated that the shares issued pursuant to such an arrangement will qualify for flow-through share treatment, and will not be characterized as prescribed shares¹³⁶ (which are expressly excluded from the definition of flow-through shares¹³⁷).

Another variation¹³⁸ of this limited partnership vehicle sees the flow-through shares of the partnership transferred on a rollover basis to a mutual fund in exchange for mutual fund shares. After dissolution of the partnership, the former limited partners receive mutual fund shares which can be redeemed at the net asset value of the fund. The individual investor need not concern himself with decisions with respect to particular flow-through shares, because a mutual fund manager will perform these

tasks. However, the lag time between the purchasing of the flow-through shares and cashing out of the mutual funds is typically several years¹³⁹; hence, this type of arrangement is best suited for those investors who are not looking for a quick re-sale of the shares.

Usually, investors are seeking the most guaranteed, or risk averse tax shelter they can find: in other words, they are looking for assurance that the corporation will incur the exploration expenses which will earn the deductions that will be renounced to the investors, and they are looking for assurance that the shares can later be liquidated at at least the price that was originally paid. Additionally, they do not wish to incur any extra liabilities as a result of the investment. With respect to the liability issue, it has already been demonstrated that because investors and exploring corporations no longer have to assume a rather artificial principal-agency relationship in order to effect a transfer of deductions from corporation to investors, there is no longer the potential for investor tortious liability for the actions of the corporation. There is still no guarantee for the investor that a corporation will incur expenses which will qualify for deductions, but, barring a negligent or fraudulent situation, the undertaking of "Canadian exploration expenses" is a fairly straightforward commitment.¹⁴⁰

The remaining risk variable -- the desire on the part of investors to receive a return on the shares at least equal to the price that was originally paid -- has attracted the greatest amount of attention. An explicit, pre-arranged and guaranteed-price buy-back commitment made by issuing corporations to

investors is now prohibited by the Income Tax Act.¹⁴¹ However, many arrangements short of such an explicit and direct commitment have been attempted; for example, the issuing corporation agrees to buy back limited partnership units on dissolution of the partnership at a previously agreed price (where the partnership originally purchased the flow-through shares of the corporation¹⁴²); or, a third party (e.g., the promoter) agrees at the time of purchase to buy back the shares at a guaranteed price¹⁴³; or, the practice of "short selling", where the shares have actually been sold to another party prior to their purchase by the investor, and then in a short turnaround time (e.g. two weeks) the shares are bought by the investor and delivered to the third party.¹⁴⁴ Proposed new amendments to the existing restrictions on these type of risk avoidance/reduction schemes which were announced on June 18, 1987¹⁴⁵ would appear intended to severely curtail any type of indemnity, covenant etc. which would tend to ensure a limit to the losses which could be sustained by ownership of a flow-through share.

In summary, the provisions of the Income Tax Act relating to mining exploration flow-through shares have been modified continually so that the legal structure in place today is fairly comprehensive and relatively streamlined. No longer is it necessary to establish a principal-agency relationship in order for an investor to incur mining exploration deductions. Instead, agreements of prescribed duration and content permit exploring corporations to renounce the relevant deductions in favour of investors. The provisions have spawned a multitude of flow-through share arrangements. Some commentators maintain that the revised legislative structure in place since 1986 have facilitated

direct single corporation share issues but the limited partnership form (with many variations) remains a popular alternative for many investors. Most of the arrangements attempt to limit the likelihood of the investors carrying a loss on disposition of the shares. Although direct guarantee buy-backs made by issuing corporations to investors are prohibited by the Income Tax Act, indirect schemes abound. Proposed revisions to the Act announced in 1987 appear intended to address these types of arrangements, and to thereby ensure that the investment vehicle is not risk-free.

D. Administration and Enforcement

The most important characteristic underlying income tax administration and enforcement is the fact that it is a self-assessing system: that is, taxpayers are statutorily obligated to file income tax returns.¹⁴⁶ Then, the Minister¹⁴⁷ is required, with all due dispatch,¹⁴⁸ to examine the return, assess tax payable and any interest or penalties which have accrued, and, where appropriate, to determine if the taxpayer is entitled to a refund.¹⁴⁹ Thus, in order to be eligible for tax deductions a taxpayer must fully disclose his financial situation to the Department of National Revenue, even though many aspects of a taxpayer's finances may not be relevant to a determination with respect to a particular tax deduction.

The self-assessing system is facilitated by a series of administrative and penal provisions set out in the Act. Failure to file a return as and when required is an offence¹⁵⁰, as is failing to provide information.¹⁵¹ Persons who wilfully attempt to evade

payment of tax payable by failing to file a return can be liable to a penalty of 50% of the amount by which the tax sought to be evaded exceeds the portion of the amount deemed to have been paid on account of tax.¹⁵² Persons who either knowingly or under circumstances amounting to gross negligence make a false statement filed or required pursuant to the Act are liable to a penalty of 25% of the amount by which the tax that would have been so payable is less than the tax payable for the year.¹⁵³ Generally, every person who attempts to evade or does evade compliance with the Act, or conspires to evade compliance with the Act is guilty of an offence and is liable on summary conviction to a fine of not less than 25% and not more than double the amount of the tax that was sought to be evaded, or both a fine and imprisonment for a term not exceeding two years.¹⁵⁴ Moreover, if the Attorney General of Canada so elects, a person charged with evasion can be prosecuted by way of indictment, and is then liable on conviction, in addition to any other penalty provided, to imprisonment for a minimum of two months and up to five years.¹⁵⁵ The Department of National Revenue (Taxation) has defined evasion for tax purposes as....

"...the commission or omission of an act knowingly with the intent to deceive so that the tax reported by the taxpayer is less than the tax payable under the law, or a conspiracy to commit such an offence. This may be accomplished by the deliberate omission of revenue, the fraudulent claiming of expenses or allowances, and the deliberate misrepresentation, concealment or withholding of material facts."¹⁵⁶

Tax evasion should be distinguished from tax avoidance.¹⁵⁷

Whereas tax evasion is an act intended to deceive so that the tax reported is less than that which would otherwise be payable, tax avoidance is considered to be those actions "where the taxpayer has apparently circumvented the law, without giving rise to a

criminal offence, by the use of a scheme, arrangement or device, often of a complex nature [whose] main or sole purpose is to defer, reduce or completely avoid the tax payable under the law."¹⁵⁸ Finally, tax evasion and avoidance should be distinguished from proper tax planning, in which a taxpayer organizes his finances in an open and proper manner so that only a minimum amount of tax is payable.¹⁵⁹ As one commentator put it, "legitimate tax planning is proper and desirable, tax avoidance is offensive to Revenue Canada and tax evasion is a criminal offense."¹⁶⁰

In addition to these enforcement provisions, the Act permits extensive inspection and investigation functions by the Minister and his delegates.¹⁶¹ Taxpayers are obligated to keep accurate financial records on their business premises, and to make these available to Department officials upon demand.¹⁶² Authorized persons can, under prescribed conditions conduct audits and investigations, enter a taxpayer's premises, examine financial records and seize documents for evidence.¹⁶³ The Minister can authorize an inquiry concerning any matter pertaining to the administration or enforcement of the Act.¹⁶⁴

Because the flow-through share deduction provisions can greatly reduce the actual costs of exploration, and have significant tax advantages for investors, there is opportunity for unscrupulous operators to engage in fraudulent or evasive practices with respect to flow-through share applications. As one commentator describes it,

...the incentive exists to manipulate the recorded costs of exploration to maximize the tax contribution while minimizing the sponsor or investor cost. In the

extreme, totally fraudulent schemes of cost attribution could create conditions where no private funds are at risk and government tax credits fully fund exploration activity, or even where no actual exploration activity is undertaken for the tax credits claimed.¹⁶⁵

No information could be obtained from the Department of National Revenue (Taxation) concerning detected incidents of abuse associated with flow-through share operation.¹⁶⁶ However, it is known that a staff of about one hundred officials have been assigned the responsibility of administering flow-through provisions since 1983.¹⁶⁷

Since 1970, the Department of National Revenue (Taxation) has published information circulars which are intended to inform the public about procedural matters relating to the Act, and interpretation bulletins, which are intended to inform the public of the Department's view of the sections of the Act it administers, and of any changes in the interpretation of these sections.¹⁶⁸ However, interpretation bulletins are not binding on the Department.¹⁶⁹ As well, since 1970, the Department of National Revenue (Taxation) has provided advance rulings to taxpayers, in which, prior to a taxpayer having completed a particular transaction or arrangement, the Department supplies a binding commitment as to how it intends to interpret and apply the law in a particular set of circumstances.¹⁷⁰ A fee is charged for this service.

A taxpayer who is not in agreement with an assessment of tax payable as determined by the Department of National Revenue (Taxation) can, within certain conditions, negotiate or plead his case to representatives of the Department, or more formally to the Tax Court of Canada, the Federal Court, and finally the Supreme

Court of Canada.¹⁷¹

Pursuant to federal legislation,¹⁷² the federal government collects and administers provincial personal income tax on behalf of all the provinces except Quebec, and then makes payments to the provinces. Alberta, Ontario and Quebec collect and administer their own corporate income tax. Quebec collects and administers its own personal and corporate income tax.

E. The Impact of Flow-Through Shares

As was mentioned earlier, the Canadian mining sector is notoriously cyclical, with its health and level of activity largely dependent upon international market factors beyond domestic control. As with the international upward revaluation in energy prices in the late 1970's, this was also a period of tremendous prosperity and growth for the mining sector.¹⁷³ In Canada, this "boom" period peaked for the mineral resources industry in about 1979 or 1980.¹⁷⁴ From about 1980 through 1982, Canadian mineral incomes plummeted, falling to low levels characteristic of the 1975 pre-"boom" era.¹⁷⁵ The Canadian mining industry was in a loss position in 1982, and profit levels recovered only marginally in 1983 and 1984.¹⁷⁶

Dr. Basil Kalymon, professor at the Faculty of Management Studies, University of Toronto, comments on the situation in the mineral sector in 1983 as follows:

Under such profitability conditions in the industry, it is evident that many companies have, since 1982, operated in a non-taxable position and are not in a position to benefit from fast write-off provisions for exploration activities or to utilize earned depletion allowances from such activities . . . Such profit levels do not permit the industry to obtain full tax advantages from their exploration activities, which would be restricted by the reduced cash flow available in any case. In this context, the evolution in 1983 of flow-

through financing of exploration which transfers the tax writeoffs directly to the investor is quite understandable.¹⁷⁷

As discussed earlier in the paper, it was in 1983 that the enhanced earned depletion allowance (the mining exploration depletion allowance) was added, making it possible for qualifying applicants to receive an extra 33 1/3% deduction on top of the 100% Canadian exploration expense deduction already in place.

The Prospectors and Developers Association estimates that from January 1983 through April 1985 \$261 million was raised through flow-through share issues.¹⁷⁸ It has been estimated that a further \$700 million was raised through flow-through financing in 1986 and up to \$1 billion in flow-through shares had been projected for 1987.¹⁷⁹ Kalymon observes that both senior and junior companies have been attracted to flow-through share financing¹⁸⁰: for seniors, because of the low profitability associated with the period 1983 - 1985, the transfer of tax deductions to investors through flow-through share vehicles may be more attractive than it would have been had the seniors been able to make use of the deductions against their own income. For juniors, given their inherent lack of income from production, the benefits of flow-through financing are self-evident.

Available evidence strongly supports the conclusion that flow-through share financing has been an important stimulus to mining exploration, and is probably responsible for a recent upsurge in the number of new mine openings in Canada.¹⁸¹ In addition, the increased exploration activity has had a positive effect on the employment situation in many outlying mining communities.¹⁸²

F. The Future of Mining Exploration Flow-Through Shares

On June 18, 1987, a White Paper outlining detailed proposals for reform of Canada's tax system was tabled in the House of Commons. The objectives of the reform were stated to be "a fairer, more understandable system that encourages initiative, strengthens growth and job creation, and provides a more reliable and balanced source of revenues to finance essential public services."¹⁸³ It was the opinion of the Government that the accumulation of "special measures" in the tax system had "undermined tax fairness, damaged opportunities for economic growth and job creation, and seriously reduced the system's stability and its reliability in raising revenues."¹⁸⁴ The tax reform objectives were to be achieved by "lower tax rates, a broadening of the tax base through the restriction of special tax preferences, a reduction in personal income tax brackets ... and the conversion of all personal exemptions and some deductions to tax credits."¹⁸⁵

Many aspects of the mining exploration flow-through share provisions will be significantly affected by proposed reforms as they have been described in existing government documents. Although the focus of this paper is on existing incentives, the impact of flow-through share financing has been so significant, and the changes proposed are so sweeping that a few words on the future of flow-through shares are in order.

As has been described earlier, the rise to prominence of mining exploration flow-through financing was in many ways a gradual process, involving changes to legislation regarding the percentage deductions available, the ability to deduct mining expenses against non-mining income, capital gains, and so on. So

too, it would appear that the emasculation of the CEE-MEDA flow-through share incentive will be a gradual process, consisting of many components.

Discussion of changes to the flow-through share provisions is complicated by the fact that there have been two changes announced to the original reform package of June 18, 1987: first, a supplementary package of proposed reforms was tabled in Parliament on December 16, 1987, and then a consequential change specific to the flow-through provisions was announced by the Honourable Michael Wilson, Minister of Finance on May 3, 1988. Consistent throughout all three proposed changes, the mining earned depletion allowance is to be phased out over the next two years: in the original tax reform announcement of June 18, 1987, the combined 133 % earned depletion plus Canadian exploration expense deduction was to remain available until June 30, 1988. Then, from July 1, 1988 through June 30, 1988, a total 116 2/3 % deduction was to be provided. Following this, the earned depletion was to be removed altogether, leaving only the 100% Canadian exploration expense deduction. However, the proposed changes tabled in Parliament on December 16, 1987 modifying the June 17, 1987 reform proposals extended the 116 2/3% period from June 30, 1988 to December 31, 1989.¹⁸⁶ Then, coinciding with the May 3, 1988 announced introduction of the new Canadian Exploration Incentives Program (a grant initiative intended to replace MEDA, discussed in Part Two of the paper, supra), the 133% CEE plus MEDA deduction was extended for individuals from June 30, 1988 to December 31, 1988.¹⁸⁷ Taken together, these proposals will make flow-through share offerings considerably less enticing to many investors.

Several other proposed changes could have significant impact on the attractiveness of flow-through share issues. It has been proposed that the top personal federal income tax marginal rate be reduced from 34% to 29% (e.g., a total of 5%).¹⁸⁸ As a result, the after tax cost of flow-through investments will go up, making them less attractive to taxpayers in this tax bracket.¹⁸⁹ As well, it has been proposed that the rate for capital gains to be taxed as income be increased from the current 50% to 66 2/3% in 1988 and 75% in 1989 and beyond.¹⁹⁰ This too will have the effect of making flow-through share investments less attractive, since a greater part of the proceeds of the shares on disposition will be subject to tax. Additionally, the federal government proposes to restrict the capital gains exemption to a maximum of \$100,000, and a further restriction is provided by a "cumulative net investment loss" feature.¹⁹¹ As one commentator put it, the effect of these restrictions on capital gains is that "it will be extremely difficult to realize an exempt capital gain if flow-through shares are purchased after 1987."¹⁹² In addition, a proposed more broadly written definition of "prescribed shares" is intended to curtail many risk reduction methods currently in use.¹⁹³

The net effect, then, is to leave the flow-through structure for mining exploration in place, but to reduce or remove many of the features of the incentive which made it attractive in the first place. Looking on the bright side, from an investor's point of view, however, the Government of Canada has admitted that special temporary "tax incentives or government subsidies" might be added in the future "during periods of depressed prices or economic downturns to ensure the survival of exploration

activities in Canada."¹⁹⁴ The recently announced Canadian Exploration Incentives Program (discussed in greater detail supra) might qualify as a "temporary" measure.

Conclusions to Part One: Tax Incentives to Encourage Mining Exploration

There are a wide variety of tax incentives which can encourage mining exploration activity in Canada, pursuant to federal and provincial income tax legislation and provincial mining "royalty" statutes. Generally, the deductions are of most value to those explorationists who can offset their exploration expenses against revenue from production (the flow-through share and mining exploration depletion allowance provisions are an exception to this statement). The tax system is usually designed to take into consideration the existence of grants and other benefits in the computation of a taxpayer's income.

Since 1983, the most important tax incentive (in terms of dollar input) has been the 133 1/3% combined Canadian exploration expense (CEE) and mining exploration depletion allowance (MEDA) deduction, where the tax benefits of the deduction flow-through to investors. The basic mechanical elements of this incentive were available for many years prior to 1983, but in that year MEDA was introduced, altering the deduction from 100% (for CEE) to 133 1/3% (for CEE plus MEDA) and it quickly became extremely popular with explorationists and investors alike. In the first years of operation, in order to derive the benefits offered by the flow-through package but avoid investor liability for damages associated with exploration, many individuals found it necessary to arrange their affairs in a principal-agent (explorationists-investor) relationship which was strained and cumbersome. As a result of amendments introduced in 1986, a more streamlined and straightforward flow-through system was introduced, which avoided the need for principal-agency fictions in favour of a pre-arranged

and filed renunciation of MEDA-CEE tax benefits from explorationists to investors. The flow-through share provisions have resulted in hundreds of millions of dollars worth of mining exploration activity, and a significant increase in mines now slated for production. In 1987, tax reform proposals were released which, if adopted, would remove many of the attractive tax advantages associated with flow-through share arrangements by 1990. A direct expenditure (grant) flow-through program has been announced which will take effect as the tax incentives are phased out.

An elaborate administrative structure is set up to collect tax revenue and distribute tax incentives. Tax bulletins, circulars and advance rulings published by the Department of National Revenue help to structure administrative discretion. An appeal process allows taxpayers to dispute their tax claims from the administrative level through to the Tax Court, the Federal Court and the Supreme Court of Canada. It is an offence to not file a return, and to supply false information. Tax officials have been given extensive powers to enforce the legislation, including inspection and investigation powers. There is a staff of about one hundred officials assigned to flow-through share administration.

Part Two: Mining Exploration Grants

Introduction

Several jurisdictions in Canada have introduced direct expenditure (grant) programs intended to encourage mining exploration. In some cases, the programs available today are merely the latest version of what has been a fairly extensive tradition of financial stimulation to the sector, whereas in others the programs represent a new approach to governmental support. In this section of the paper, grant programs from five jurisdictions are discussed: the Ontario Mineral Exploration Program, the British Columbia Financial Assistance for Mineral Exploration initiative, the Quebec Program of Financial Assistance to Mining Exploration and Program of Financial Assistance for Prospection in Bas-Saint-Laurent and the Gaspesie, the Yukon Prospector's Assistance and Exploration Incentives Program, and the recently announced federal Canadian Exploration Incentives Program. More attention has been devoted to the Ontario program in this section of the paper than to the others because the Ontario initiative is the most established and one of the most generous (in financial terms) of the grant programs currently operating. On the other hand, the Canadian Exploration Incentives Program is described in comparatively brief terms, because it has only recently been announced and has not yet become operational.

I. The Ontario Mineral Exploration Program

A. Background

In 1980, it was perceived by the government of Ontario that producing resource companies in Ontario had a significant exploration cost advantage over non-producers since a producing company was usually able to obtain comparatively full tax relief for its exploration expenditures.¹⁹⁵ In addition, concern had been expressed with respect to the lack of new mine openings in Ontario after 1971, the closure of thirteen mines during the period of 1975 to 1979 and the need to stimulate mining in Northern Ontario.¹⁹⁶ In September, 1980, the Ontario Mineral Exploration Program (OMEP) was introduced by a statute of the same name,¹⁹⁷ replacing the "Mineral Exploration Assistance Program" and mineral exploration incentives available pursuant to the Small Business Development Corporations Act.¹⁹⁸ In general terms, OMEP is directed at individuals, "juniors", and non-mining companies.¹⁹⁹ It provides, depending upon the applicant, a grant or tax credit up to 25% of eligible exploration costs incurred in Ontario.²⁰⁰ The maximum OMEP grant/tax credit available for any one year is \$500,000.²⁰¹

B. Operation

(2) Qualified Applicants

Pursuant to s. 3 of the OMEP Act, individuals ordinarily resident in Canada and not actively engaged in mineral explorations in Ontario, as well as partnerships, and pension funds with 10% of their contributors resident in Ontario are eligible for OMEP grants. There is a difference in eligibility treatment for pension funds and individuals: with

respect to pension funds, according to the Act, if 10% of the contributors to the fund are resident in Ontario, then the fund is deemed to be "a person ordinarily resident in Ontario" and thus eligible for OMEP funding²⁰²; in contrast, individuals applying for OMEP grants, are required to be "ordinarily resident in Canada".²⁰³

Corporations²⁰⁴ and credit unions²⁰⁵ are eligible for a 25% tax credit on eligible exploration costs (in certain circumstances convertible to a grant, as discussed infra). Corporations, to be eligible, must not have "actively engaged in mineral production" in Ontario.²⁰⁶ There is no definition of the "not actively engaged in mineral production" requirement provided in the statute, but the phrase has been interpreted by OMEP administrators as meaning that the corporation must have abstained from mineral production for a designated two year period.²⁰⁷ It is interesting to note that OMEP administrators apparently do not expressly require individual applicants to have abstained from mineral production for a minimum two year period.

(2) The Application Process

Essentially, the OMEP Act calls for a two-stage application process: section 2 (1) requires that the proposed program must be "designated" by the Minister. This designation is to be made at the "discretion" of the Minister. Before receiving this designation, applicants must disclose their source of funding.²⁰⁸ Applicants are allowed to designate any number of programs in a fiscal year. However, they will only be entitled to receive aggregate grants or tax credits for that year up to a maximum of \$500,000. Where one source of funding, such as a large fund, a

limited partnership, or similar entity, finances programs carried out by more than one company, the \$500,000 limit is imposed as follows: all designation applications are denied after the first \$2 million of exploration expenses has been designated.²⁰⁹ This \$2 million limitation became necessary as a result of the proliferation of multi-million dollar limited partnerships established to take advantage of the attractiveness of flow-through tax provisions (discussed supra). The cap is intended to facilitate a more equitable distribution of the limited OMEP funding available by preventing an over-concentration of OMEP financing in one or two mega-investment vehicles.²¹⁰ Once the designated mineral exploration project is completed, then the applicant can file for a grant.²¹¹ As the process is currently arranged, the potential applicant must actually make the exploration expenditures, and then make the application for grant within six months of its completion.

(3) Eligible Expenditures

Only certain expenditures are eligible for OMEP assistance. The terms and conditions are set upon designation²¹² by the Minister, and by regulation.²¹³ Only expenditures leading to and carried out prior to a production decision will qualify for OMEP. Further, expenditures generally in relation to oil and gas and industrial mineral exploration do not qualify.²¹⁴ Preliminary type exploration expenses are usually entitled to a 100% write off under OMEP, while those related to shaft sinking, temporary access roads and depreciation on machinery receive only a 25% subsidy.²¹⁵

(4) The Tax Credit/Grant Option

Pursuant to s. 3(6), corporations which are entitled to an OMEP tax credit and are "principally engaged in mineral exploration" may, in lieu of carrying the tax credit forward, apply to the Minister after the end of its taxation year for the payment of a grant, and the Minister "may" pay a grant equal to the amount of the unused tax credit. Essentially, this provision allows "exploration companies" (i.e. juniors, with no production revenue with which to offset a tax credit) to receive the pecuniary benefits of OMEP immediately, rather than through the tax system at some "carried forward" point down the line. Curiously, however, individuals are not given the option of converting their direct OMEP grants into tax credits. The author is unaware of a situation where an individual might prefer a tax credit to a direct grant, but the carried forward privileges of the tax credit could be beneficial for those individuals anticipating large income tax payments.

C. Integration With Tax System

The tax credit/grant option available to corporations principally engaged in mineral exploration is just one example of the integration of OMEP with the tax system. Generally, OMEP is well synchronized with the federal and provincial income tax regimes at both administrative and design levels. Prior to January 1, 1981, individuals and corporations were entitled to a 100% tax write-off of exploration expenses, in addition to receiving the OMEP grants for 25% of exploration expenses.²¹⁶ In effect, this previous system would appear to allow a 125% tax and grant cumulative write-off of exploration expenses. However,

since January 1, 1981, the 100% tax write-off has been reduced by the amount of the grant,²¹⁷ so that there is now effectively a 75% tax write off for eligible exploration expenditures where the taxpayer also has received an OMEP incentive.

The rise in popularity of the flow-through share tax write-off vehicle for mineral exploration has engendered a certain amount of problems and adjustments for OMEP operations. As discussed earlier in the paper, until amendments to the federal Income Tax Act were made in 1986, it was necessary for investors and exploration companies to enter into principal-agent relations so that exploration companies incurred exploration expenses on behalf of the investors (and thus investors were able to deduct the expenses against their income). Confronted with many flow-through share funded exploration ventures (particularly limited partnerships) OMEP officials responded as follows:²¹⁸ first, it was established in 1983 that grants would be issued directly to investors, rather than tax credits to the exploration corporations; and second, in 1985, new administrative guidelines were introduced which limited OMEP subsidies to only one program for each source of funding. This meant that in some cases limited partnerships involved in several exploration projects were forced to choose which of their projects would be eligible for OMEP assistance.

On at least one occasion, OMEP administrative practice was disputed by a disgruntled applicant. In 1985, a flow-through share limited partnership (CMP) was financing several exploration ventures in Ontario. One of the projects involved Lytton Minerals Ltd.²¹⁹ Following the "one project per source of funding rule",

this limited partnership chose an exploration venture other than the Lytton project. Lytton, nevertheless, argued that its exploration expenses should be eligible for OMEP funding on the basis of an interpretation of "incurred expenses" under s. 3(2) of the OMEP Act. Eventually, in 1988, the issue reached the Supreme Court of Ontario (Trial Division) where the Lytton claim was rejected. Boland, J., speaking for the Court, held that the flow-through share agreement which Lytton had reached with CMP clearly reflects that the parties themselves contemplate from the outset that the grant or tax credit available pursuant to the OMEP Act would be available to the benefit of CMP:

The fact that CMP was unable to use the tax credit in question in my respectful view is irrelevant. Lytton and CMP by agreement created a relationship of agent and principal and as a result of that relationship certain benefits flowed to each of them. Accordingly, Lytton is now estopped from denying that relationship.²²⁰

OMEP officials have been informed that Lytton is appealing this decision.

In 1986, the Income Tax Act provisions relating to flow-through share financing were amended so that exploring corporations incurred the expenses, but were able to renounce these expenses for tax purposes to investors. Since April, 1987 OMEP guidelines were issued which have the effect that companies will now be able to receive OMEP tax credits rather than investors receiving grants.²²¹ The guidelines also state that a single source of funding is able to finance more than one program, but only until the first \$2 million of exploration funds has been designated.²²²

From an administrative perspective, s. 4(2) and 4(3) of the OMEP Act require that copies of OMEP tax credit certificates be sent to the Minister of Revenue and accompany

corporate tax returns. Information obtained from applicants concerning OMEP grants or tax credits is normally privileged and confidential,²²³ except that it may be communicated to any officer of the Department of National Revenue of the Government of Canada, or of the Ministry of Revenue or the Ministry of Treasury and Economics of the Government of Ontario.²²⁴

D. Appeals of OMEP Assessments

Pursuant to s. 7 (1) of the OMEP Act, the Minister is required to consider all grant or tax credit applications. However, he then has discretion to approve payment of the grant or tax credit, the amount thereof, or to determine that no OMEP incentive shall be awarded. Where the applicant requests particulars concerning an assessment, or where the Minister has determined that no grant or tax credit shall be forthcoming, then according to s. 7(2) the Minister is under a legal obligation to notify the applicant in writing of "the basis" of the decision, and to inform the applicant of his right to object to such decision. If the applicant is not satisfied either with the s. 7(1) determination or the s. 7(2) stated decision, he has sixty days to serve the Minister with a notice of objection.²²⁵ The Minister is then required to re-consider his actions, and notify the applicant of his new decision.²²⁶ The OMEP Act and regulations do not provide an appeal procedure, so it is not clear whether the filed notice of objection is the only opportunity for the applicant to "make his case", or whether an informal oral "hearing" will take place. In practice, communications between applicants and the Ministry are ongoing, so that applicants will normally have an opportunity to respond to an unfavourable

decision before it has been finalized.²²⁷ The Minister's reconsideration is final and not subject to appeal, except where it involves the interpretation of a provision of the OMEP Act, or an issue "solely of law".²²⁸ In such a case, appeal to the Supreme Court of Ontario can be taken.²²⁹ According to the chief administrator of OMEP, to date less than 5% of the Minister's original determinations have been formally objected to, and there has been only one appeal to the Supreme Court.²³⁰

E. Investigation and Enforcement Provisions

The OMEP Act contains a number of offences, audit and administrative seizure powers, and authority to recover overpayments. Section 11 states that persons knowingly providing false or misleading information are guilty of an offence and liable to a fine of not more than \$1000 (individuals) or \$10,000 (corporations). In addition, it is an offence for persons to convert payment of a grant or tax credit to uses which are not authorized.²³¹ Disclosure of privileged and confidential information is an offence.²³² Pursuant to s. 12, authorized persons are given wide investigatory powers to enter into premises, examine lands, conduct audits, seize material, and compel production of stipulated information and documents. In addition, failure to provide reasonable assistance with audits, or to provide requested information is an offence subject to the aforementioned penalties.²³³ To date, these offence provisions have not been used.²³⁴

Persons who receive grants or tax credits to which they are not entitled, and persons receiving overpayments are required to

return the non-entitled overpayments.²³⁵ The Crown can bring recovery proceedings against persons receiving unentitled grants or tax credits or overpayments.²³⁶ To date, use of these provisions has not been required.²³⁷

F. Impact of OMEP

In July, 1986, the Final Report and Recommendations of the Advisory Committee on Junior Resource Financing and the Competitive Position of Ontario, commonly known as the Thompson Report, was released. The Advisory Committee (herein also referred to as "the Thompson Committee") took a close look at OMEP, as well as virtually every other aspect of the Ontario junior mining industry. The findings of the Thompson report with respect to OMEP revealed how the Ontario exploration sector viewed OMEP; since then, and in response to the Thompson findings, the Administrative Guidelines for OMEP have been changed. The OMEP-related observations contained in the Thompson report and the administrative changes to OMEP will be briefly discussed below.

Generally, the Thompson Committee was of the opinion that OMEP has been effective in encouraging mining exploration in Ontario, particularly with respect to junior exploration companies, although the Committee thought that an additional incentive along the lines of the Quebec double depletion program would be advisable.²³⁸

According to the Thompson Report, from September 1980 to March 31, 1986, 1,513 programs were designated for OMEP assistance amounting to \$359 million in planned exploration expenses.²³⁹ To March 31, 1986, 920 of these programs were completed, representing total exploration expenses of \$152 million of which OMEP

contributed \$30 million. The Thompson Report stated that according to government estimates, OMEP financially assisted 28 companies which have partially developed ore deposits with production potential in the foreseeable future.²⁴⁰

As part of their investigations, the Advisory Committee sent a questionnaire to all 270 companies and individuals who received an OMEP grant in 1985. Of these, there were 83 responses. 83% of respondents felt that the elimination of OMEP would affect their exploration plans in Ontario.²⁴¹ Most respondents seemed "quite satisfied and happy about the operation of OMEP".²⁴²

In April, 1987, in response to the recommendations of the Thompson Advisory Committee, a number of changes to the administration of OMEP were announced by the Mines and Minerals Division of the Ontario Ministry of Northern Development and Mines.²⁴³ Effective April, 1987, proof of funding will no longer be required to obtain a designation; as well, applicants will be allowed to make changes to a designation in the course of a program, with respect to the source of funding and the total eligible expenses. Applicants will be allowed to designate any number of programs in a fiscal year, providing the aggregate does not exceed \$500,000. As discussed earlier, where one source of funding finances programs carried out by more than one company (e.g., a multi-million dollar limited partnership flow-through share vehicle), applications will be denied after the first \$2 million has been allocated. The new guidelines also explicitly state that, where a program is financed by the sale of flow-through shares, the issuing company, rather than the shareholders,

will be eligible for the OMEP credit. It would appear that the changes to administration of OMEP are designed primarily to clarify current administrative practice and streamline the process, and thus make it easier for applicants to use the program.

G. Summary Observations

The Ontario Mineral Exploration Program is an important incentive for mineral exploration in Northern Ontario. Because it can operate as a grant rather than a tax subsidy, it can potentially provide up-front financing for exploration, and does not depend upon the tax position of the applicant. It is perhaps understandable that OMEP has come under fire for its somewhat lengthy bureaucratic operations: applicants want funding, they do not want paperwork. On the other hand, it is understandable that the Ontario Ministry of Northern Development and Mines would want to ensure that the money they provide will be used properly. In contrast to tax deduction programs, grant initiatives such as OMEP tend to operate in a more discretionary and less automatic fashion. This gives government greater control and flexibility in dealing with each individual applicant. The overall conclusion of the Thompson Advisory Committee appears to have been that OMEP is a useful incentive for junior resource company exploration in Ontario, although the Committee stressed the need for additional tax based incentives to supplement it.

I. British Columbia Exploration Grant Programs

A. Background

In 1986 the British Columbia provincial government announced the introduction of a one-year "Financial Assistance for Mineral Exploration" (FAME) program.²⁴⁴ A total of \$5 million was allocated for funding. The program was renewed for the 1987 fiscal year (April 1, 1987 to March 31, 1988), and again given a \$5 million budget. There are two broad objectives of the FAME program: first, to provide part of the risk capital required by prospectors and mineral exploration companies to finance the discovery of new mines, and second, to extend the economic lives of developed mines and contribute to community stability in existing mining regions.²⁴⁵ There are three component initiatives of FAME intended to achieve these objectives: the Prospectors Assistance Program (PAP), the Mineral Exploration Incentive Program (MEIP), and the Accelerated Mine Exploration Program (AMEP). Description of the operation of each of these programs is given below.

B. Prospectors Assistance Program

Although the Prospectors Assistance Program is part of the "new" FAME initiative (i.e., introduced in 1986), in fact there have been previous programs providing financial aid to prospectors in British Columbia.²⁴⁶ Pursuant to the terms of the 1987 Prospectors Assistance Program, grants of up to \$5,000 can be awarded to qualified prospectors exploring for coal, metallic mineral (including placer deposits) and industrial minerals (except sand and gravel).²⁴⁷ Applications are selected on the basis of the quality of documentation of the proposal (50%), the experience and training of the applicant (20%), references and

recommendations (15%) and the financial commitment of the applicant (15%).²⁴⁸ Activities eligible for funding include prospecting, travel equipment rental, and a daily allowance of \$100 a day.²⁴⁹ One half of the grant is payable in advance.²⁵⁰ Prospectors are required to submit detailed field reports outlining work completed, rock types, mineralization and structures encountered.²⁵¹ Field reports are treated as confidential by the Ministry of Energy, Mines and Petroleum Resources, unless the prospector has agreed to their release in writing.²⁵²

Where grant conditions are not fulfilled, final payment can be withheld, and in "serious cases of negligence or abuse", return of all funds granted will be requested.²⁵³ It is an offence to refuse or neglect to carry out an undertaking made to the Director of Prospectors Assistance.²⁵⁴ The provision of financial aid is discretionary²⁵⁵; the literature accompanying description of the PAP initiative stresses that "[t]he Ministry reserves the right to refuse any request for assistance, in whole or in part."²⁵⁶ Funding for prospectors assistance has been increased from \$200,000 in 1986-1987 to \$400,000 in 1987-1988.²⁵⁷

C. Mineral Exploration Incentive Program

The Mineral Exploration Incentive Program provides grants to eligible exploration companies or individuals, to cover up to one-third of eligible exploration expenses on properties with identified economic potential.²⁵⁸ Maximum assistance is \$150,000 per project, to an aggregate maximum of \$300,000.²⁵⁹ Eligible work can include geological, geophysical, or geochemical surveys, drilling, trenching, or any other work intended to further evaluate the potential of a property.²⁶⁰ Only 25% of total

expenditures on tunneling, drifting, other lateral excavation and shaft sinking is considered eligible for reimbursement pursuant to the program.²⁶¹ The source of the applicant's share of the funding is the responsibility of the applicant, and could be from retained earnings, equity offerings and flow-through-share offerings, among other sources.²⁶² Any income tax implications arising from payment of the grant are the responsibility of the recipient.²⁶³ Where flow-through share financing vehicles are used, FAME administrators have determined that the FAME grants will be issued to the companies who incur the expenses and not the investors.²⁶⁴

Funding depends on the following criteria: how advanced the project is (30%), current markets and market outlook of the commodities being sought (10%), the type and degree of financial commitment that the applicant intends to apply to the project (10%), the technical quality and type of documentation available on work previously carried out on the property and on the proposed exploration program (20%), the existing infrastructure serving the project area (10%), and the applicant's need for financial assistance to facilitate the proposed exploration project (20%).²⁶⁵

Applicants are required to submit detailed reports accompanying their application, outlining the main target of the program, property names, location, number and type of claims or leases, stating ownership, brief details of any operation agreements or other contractual obligations that apply to the property, regional geology, current status of exploration, with highlights of results to date, recommended work program, estimated start and completion date of program, intended source of funding, for the applicant's

share of the program, a map showing claims and summarizing important features, and, where applicable, a copy of the latest Annual Report and a list of Directors and Officers.²⁶⁶ Successful applicants must provide a work schedule showing the timing of key activities and expenditures.²⁶⁷ Reports of work completed are also required.²⁶⁸ Ministry staff may visit the property to monitor progress with programs.²⁶⁹ The Ministry reserves the right to cancel grant approvals on thirty days written notice, if in the judgment of the "FAME Management Committee"²⁷⁰, sufficient progress is not being made.²⁷¹ The technical report will be kept confidential for one year from the date of submission.²⁷² The granting of financial assistance is discretionary.²⁷³

D. Accelerated Mine Exploration Program

The Accelerated Mine Exploration Program provides grants to mining companies to cover up to one-third of eligible exploration expenses at "developed" mines for the purpose of discovering additional reserves.²⁷⁴ "Developed" has been defined as current or recent production.²⁷⁵ Only 25% of total expenditures on tunnelling, drifting, other lateral excavation and shaft sinking will be considered as eligible expenditures for reimbursement.²⁷⁶ Maximum assistance is \$200,000 per project.²⁷⁷

In evaluating applications, the Ministry is obligated²⁷⁸ to "pay particular attention"²⁷⁹ to the following criteria: geological basis for finding additional reserves (25%), financial commitment (10%), technical competence of applicant (20%), potential impact on the local economy (25%), and the need for financial assistance to facilitate the proposed project (20%).

Applicants are required to submit detailed technical reports with their applications which contain information similar to that required for the Mineral Exploration Incentives Program, as well as a description of the current ore reserves on the property, current milling rate and the approximate number of people employed at the operation and annual expenditures on wages, goods and services in British Columbia.²⁸⁰

As with the MEIP initiative, successful applicants are required to submit work schedules, monthly reports, and may expect periodic visits from Ministry staff to monitor progress.²⁸¹ Again, the Ministry can cancel grant approvals on thirty days written notice if, in the judgment of the FAME Management Committee, sufficient progress is not being made.²⁸² Technical reports will be kept confidential for one year from the date of submission.²⁸³ Issuance of Accelerated Mineral Exploration Program grants is discretionary.²⁸⁴

E. Legal Structure Underlying MEIP and AMEP

In contrast to the prospectors assistance component of the FAME program, there is very little legislation or regulations governing the operation of the Mining Exploration Incentive Program or the Accelerated Mineral Exploration Program. Unlike the PAP initiative, there is no statute specifically authorizing the existence of the MEIP and AMEP programs. In fact, there is only a vague general authorization for the Minister of Energy, Mines and Petroleum Resources (EMPR) to fund and administer programs in the Ministry of Energy, Minerals and Petroleum Act.²⁸⁵ While EMPR's involvement in the creation and administration of prospectors assistance programs is

specifically provided for,²⁸⁶ the Minister must presumably rely for his authority over the MEIP and AMEP programs on the general power extending to "all matters relating to energy, mineral resources and petroleum resources that are assigned to the minister by any Act or by the Lieutenant Governor in Council. . ."²⁸⁷, as well as a general power to "regulate all mining activity"²⁸⁸. The Minister of Energy, Mines and Petroleum Resources is also given the power to "authorize the expenditure of money for the construction, reconstruction or repair of trails, roads, bridges and *and other things to facilitate exploration* for and development of mineral and petroleum resources in the Province"²⁸⁹ (*italics added*). On a somewhat strained interpretation of the *ejusdem generis* rule, this power could be used to justify the existence of the MEIP and AMEP components of the FAME program. These general provisions, together with the legislative approval of EMPR's expenditures contained in Appropriation Acts²⁹⁰ are the only source of legislative authority for the MEIP and AMEP initiatives. It should be noted, however, that this assortment of vague legislative powers provides no statutory guidance as to the day to day administration of MEIP and AMEP.

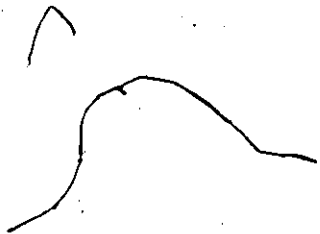
F: Impact of FAME Programs

According to the B.C. Minister of Energy, Mines and Petroleum Resources, the 1986/87 version of FAME generated \$42 million of direct expenditures by the mineral exploration industry, including \$8 million in wages.²⁹¹ Over 400 applications were received for prospectors' assistance, from which 75 received funding.²⁹² Of these, 11 found new mineral deposits and follow-up work could

result in expenditures of a further \$3 million.²⁹³ Twelve of the nineteen mines that received FAME grants significantly increased their ore reserves.²⁹⁴ Of 61 mineral exploration projects assisted through FAME, eighteen reported the likelihood of establishing a new mine within a 10 year time frame.²⁹⁵ Of 256 applications for the Mineral Exploration Incentive Program, 58 received grants.²⁹⁶ With respect to the Accelerated Mineral Exploration Incentive Program, 18 of 31 applications were accepted.²⁹⁷

G. Summary Observations

Through the FAME initiative, the B.C. Ministry of Energy, Mines and Petroleum Resources has introduced a three-pronged effort to induce mineral exploration in the province. Only one of these programs, the Prospectors Assistance Program, operates pursuant to a comparatively comprehensive statutory regime. The other two programs derive their legal authority from general powers of the Ministry, and appropriations. As a result, administrators and applicant/recipients do not have the benefit of the structure and guidance provided by a relatively comprehensive legislative framework. Preliminary data on the impact of FAME suggests that it has been helpful in inducing exploration in the province.



III. Quebec Exploration Grants

A. Background

In recent years, Quebec governments have been recognized across the country as leaders in establishing incentive programs for the mining industry.²⁹⁸ At present, the major Quebec incentive program for mining exploration is undoubtedly the flow-through share provisions of the Quebec Taxation Act, discussed earlier in the paper. However, Quebec has also supplemented its attractive tax incentives with a variety of grant initiatives. From 1985²⁹⁹ to March 31, 1987, the Quebec Ministry of Energy and Resources offered an exploration cash subsidy incentive known as the Mining Exploration Financial Assistance Program (MEFAP).³⁰⁰ As well, from April 1987 to December 1990, a federal-provincial program of assistance to prospectors in the Bas-Saint-Laurent and Gaspesie region (hereinafter referred to as the Gaspesie Prospector Program or GPP) has been made available.³⁰¹ Both of these initiatives will be described below.

B. MEFAP Operation³⁰²

The MEFAP program provided assistance at variable rates for exploration work, construction of access roads to properties, and testing of new mining exploration techniques. The amount of grant depended upon the location of the exploration, the mineral that was the subject of exploration and the type of activity. Exploration in "designated areas" was more generously subsidized than exploration in other regions of the province. "Designated areas" were defined as "a region with mining potential that is affected by unfavourable economic factors and to which the government gives assistance in order to ensure its survival or to

promote the diversification of its mineral industry." The Ministry of Energy and Resources had selected four regions for the "designated area" status: Matagami, the Labrador Trough, the Gaspé Peninsula and Chapais. In these designated areas, financial assistance for certain exploration activities (e.g., blasting and/or stripping, geology and or ground geophysics geochemistry and geochemical analyses, and drilling) could reach 50% to a maximum subsidy per project depending on the activity (e.g., the maximum for geochemistry work is 50% for a maximum subsidy of \$50,000). For testing of new exploration techniques, subsidies could be as high as 75%.

The program was available to individuals, companies or partnerships. However, exploration expenses financed by the sale of flow-through shares or through the limited partnership system were not eligible for MEFAP assistance. The criteria for determining the size of a grant were stated to be as follows:

- (1) the market situation of the commodities for which exploration work is carried out; for example, gold exploration is subject to a less generous subsidy (maximum 15%) than copper/zinc (35%). Exploration for iron, asbestos and hydrocarbons is not subsidized pursuant to the program;
- (2) the importance of the commodities for which exploration work is carried out in regard to the mining industry structure of Quebec;
- (3) the potential impact of the exploration projects on "Quebec's integrated Copper/Zinc industry";
- (4) the potential impact of the commodities for which exploration work is carried out on the economy of the region and/or locality;
- (5) previous work done by the applicant on the properties concerned;
- (6) technical quality and state of progress of the exploration work carried out on the properties concerned.

The minimum amount of exploration work expenses (e.g., blasting, geology, geochemistry, geochemical analyses, drilling, tunnel excavation and specified air transportation costs, but excluding construction of access roads and testing of new exploration sites) which could receive funding was \$3000. An applicant could receive up to \$200,000 of MEFAP assistance for carrying out any given project and no more than \$500,000 in assistance for all his projects taken together in one fiscal year. Only two projects were permitted per designated area, and another two for exploration outside designated areas.

With respect to assistance for construction of access roads, the maximum subsidy was 50%, where the applicant carried out exploration work in an amount at least four times the subsidy received. For testing of new mining exploration techniques, assistance could reach up to 30% of the cost of purchasing equipment, and up to 75% of the actual cost of the work, up to a maximum amount per project of \$50,000.

The method of payment for a MEFAP subsidized project was to be determined in an agreement signed by the applicant and the Ministry. The Ministry had the authority to ask for all administrative or accounting documents to validate claims, and could verify costs by its own or third party personnel. The results of MEFAP assisted mining exploration were to be divulged completely and entirely to the Ministry. Any false declaration would automatically result in the refusal of a request or the cancellation of the financial assistance already granted. MEFAP assistance was discretionary, not automatic: the Ministry expressly reserved "full liberty to refuse in part or in whole any

request for assistance".

For the May 1, 1986 - March 31, 1987 fiscal year, MEFAP had an allocated budget of \$3.9 million dollars, which generated \$10 million in exploration expenses and funded 29 projects.³⁰³ As a result of the program new reserves of silver in the Chibougamau-Chapais region were discovered.³⁰⁴

C. Gaspesie Prospector Program Operation

The "programme d'assistance financiere a la prospection du Bas-Saint-Laurent et de la Gaspesie" (hereinafter the "Gaspesie Prospector Program" or the "GPP") is another mining exploration incentive program made available in Quebec.³⁰⁵ There are a number of features of GPP which distinguish it from MEFAP. First, MEFAP applied across the province (although certain regions were the subject of more generous assistance than others); in contrast, the Gaspesie Prospector Program is only available in a relatively small (and particularly economically depressed) region. Second, the GPP is specifically directed at prospectors, while MEFAP had a more broad exploration-wide focus. Third, GPP is jointly funded and administered by the federal and provincial governments, whereas MEFAP was an exclusively Quebec provincial government initiative.

Briefly, GPP is a four fiscal year (from April 1987 to December 1990), \$5.5 million program,³⁰⁶ with several components: first, direct financial assistance to as many as forty independent prospectors of up to \$50.00 per day to help defray costs for up to a six month period (i.e., the maximum annual grant can be \$7,000).³⁰⁷ Second, assistance for realization of claims (e.g., costs of blasting, analysis) for as many as 25 projects of up to

\$9,500 per year.³⁰⁸ Third, pursuant to the GPP, 75% of the salaries of six prospectors hired for up to six months each by exploration and mining companies for prospecting in the region will be supplied to a maximum of \$10,800 per year as well as 75% of the costs associated with prospecting up to \$7000 per year.³⁰⁹ Fourth, up to 50% of the costs of evaluating claims bought or optioned from prospectors from the date the program came into effect will be provided up to a maximum of \$50,000 per year for as many as three projects.³¹⁰ The figures provided here represent the maximums available for the first year; in fact, however, the exact sums available for each component vary from year to year.³¹¹ In addition, the monies provided can be allocated in different permutations and combinations than those set out here; for example, where a particular component of the program offers a maximum of \$50,000 per year for three projects, administrators may instead choose to distribute six half-year projects at \$25,000.³¹² The GPP also supplies non-financial services to prospectors, such as certain analyses and equipment, and advice,³¹³ but as these are not direct expenditure programs to the private sector, they will not be discussed further in this paper.

Prospector and exploration expenses financed by flow-through share or limited partnerships are not eligible for GPP funding.³¹⁴ Each application must, where appropriate, include the objectives of the work proposed, a map of the property to be explored, a description and estimate of the cost of the work proposed, the names of the persons who will carry out the work, a projected date of completion and a global budget for the project.³¹⁵ Ministry officials have the right to verify the

accounts of financially assisted projects, and to examine all associated documents.³¹⁶ An agreement must be signed between the recipient and the Ministry setting out the terms and conditions of the assistance.³¹⁷ The results of subsidized work must be completely divulged to the Ministry.³¹⁸ False statements result in the automatic disqualification of the project, and any money already provided must be returned.³¹⁹

GPP is financed primarily by the federal government (a 90-10 federal-provincial split), established by a joint federal-provincial committee, and administered by the Quebec Ministry of Energy and Resources.³²⁰ About \$1.1 million is allocated each year, for disbursement and administrative costs.³²¹ Because the program has only just come on stream, no data concerning its operation to date is available.

D. Legal Structure Underlying MEFAP and Gaspesie Prospector Program

In contrast to the Ontario Mineral Exploration Program and the B.C. Prospectors Assistance Program, MEFAP and GPP are subject to very little statutory or regulatory law. Unlike OMEP and the B.C. PAP, there is no statute devoted exclusively to the establishment of MEFAP or GPP, and the criteria of eligibility are set out in pamphlets of "norms"³²², not in statutes or regulations. From a provincial perspective, the Quebec Minister of Energy and Resources is given the general authority to devise and carry out plans and programs for the "enhancement, development and transformation" of Quebec mineral resources.³²³ The Minister also has the authority to enter into an agreement with any government or agency in conformity with the interests and rights of Quebec to facilitate the carrying out of resource development.³²⁴

The Gaspesie Prospector Program is part of a regional special assistance agreement known as the "Plan de Developpment de l'Est du Quebec"³²⁵ (the East Quebec Development Program), an initiative of the federal Department of Regional Industrial Expansion authorized by s. 6 of the Department of Regional Industrial Expansion Act.³²⁶ The Minister of Regional Industrial Expansion has the mandate to, among other things, "promote industrial development and employment opportunities in regions of slow economic growth."³²⁷ Since 1984, the federal government has initiated a more comprehensive cooperative initiative with each of the provinces to enhance mineral-industrial opportunities, called Mineral Development Agreements (MDA's),³²⁸ but the East Quebec Development Plan and in turn, the GPP are not part of the MDA system (although move is afoot to bring GPP under the MDA umbrella).³²⁹ In carrying out his functions, the Minister of Industrial and Regional Expansion is to make use of the services of other departments of the Government of Canada, and provincial governments.³³⁰ It is through this general authority that the federal Department of Energy, Mines and Resources and the Quebec Ministry of Energy and Resources are involved in GPP operation.

With no legislation specifically pertaining to MEFAP or GPP operation, the statutory control over the programs is somewhat indirect, derived from the relevant financial administration legislation. Section 49 of the Quebec Financial Administration Act³³¹, gives the Quebec Governor in Council authority to make regulations respecting the conditions of contracts, and in what cases the awarding or promise of grants must be submitted. Pursuant to s. 49, the Regulation respecting the promise and

awarding of grants³³² has been promulgated. Section 3 of this regulation provides that awards or promises of grants less than \$1 million but greater than \$5000 must have the approval of the Treasury Board, while grants equal to or greater than \$1 million require the prior approval of the Governor in Council on the proposal of the Treasury Board. The only occasion when either the Treasury Board or Governor in Council authorization is not required is when a legislative provision establishes the amount thereof, or where it is made in accordance with standards approved by the Treasury Board.³³³ Because no legislative provision or Treasury Board standards specifically pertain to the MEFAP or GPP initiatives, s. 3 Treasury Board or Governor in Council approval is apparently necessary for each grant disbursed.

Pursuant to s. 34 of the federal Financial Administration Act³³⁴, the Governor in Council is given the authority to make regulations with respect to the conditions under which contracts may be entered. Unlike the Quebec Financial Administration Act, there is no specific authority to make regulations with respect to the awarding of grants. "Contract" is defined in s. 2 of the Government Contract Regulations³³⁵ as a construction, goods, service contract or lease entered into by or on behalf of Her Majesty. Of these definitional categories, a GPP grant most closely resemble a "service contract", which is defined as "a consulting services contract or a non-consulting services contract but does not include an agreement whereby any person is employed as an officer, clerk, or employee of Her Majesty".³³⁶ It is submitted that only under a very strained interpretation could GPP grants be characterized as service contracts, and thus be subject to the regulations. As a result, there is no real federal legal

framework providing practical guidance as to the awarding or distribution of GPP grants.

E. Summary Observations

The Quebec Mineral Exploration Financial Assistance and Gaspesie Prospectors Programs are similar in that they are both designed to stimulate activities within certain regions and do not apply to all areas of the province. They are also similar in that neither operates pursuant to a well developed legal framework. The GPP is a joint federal-provincial initiative delivered through the provincial Ministry of Energy and Resources, whereas MEFAP was an exclusively provincial Ministry of Energy and Resources program. MEFAP expired March 31, 1987, and was credited for stimulating exploration which lead to important mineral discoveries. GPP has not been in operation long enough for any statistics concerning its success to have been disseminated.

IV. Yukon Mining Exploration Grant Programs

A. Background

Since 1986, the Yukon Territorial Government's Department of Economic Development: Mines and Small Business has offered two grant initiatives designed specifically to encourage mineral exploration in the territory. These two incentives are the Prospector's Assistance Program and the Exploration Incentives Program. Each will be described below.

B. Prospector's Assistance Program

Pursuant to the Prospector's Assistance Program (PAP),³³⁷ persons can receive grants of up to \$5,500 per year, of which up to \$2,000 can be used to defray travelling expenses and the remainder can subsidize operational costs. Recipients of PAP grants must be experienced prospectors, and are required to enter into "contribution agreements" with the Yukon Government which outline the terms and conditions of the contribution. Successful applicants are expected to spend at least 60 days in active prospecting, and are required to submit daily reports. Information contained in the reports shall be treated as confidential by the Yukon government for a period of five years, after which it will be made available for public inspection.

In the 1986-1987 year of the program, PAP grants were provided to sixteen of the twenty-five applicants³³⁸ for a total contribution of \$61,200 (\$75,000 had been allocated for the program). For 1987-1988,³³⁹ \$117,000 was committed for assistance to 25 of the 34 prospectors who applied (\$150,000 had been allocated). The Director of the Energy and Mines Branch of the Department has stated that several "significant finds" have been reported as a result of PAP funding, of which a number have been

successfully optioned off.³⁴⁰

PAP applications are reviewed by a committee of federal Department of Indian Affairs and Northern Development officials (DIAND), Yukon Territorial Government officials, and representatives from the Yukon Prospectors Association and the Yukon Chamber of Mines. The two non-governmental representatives assist in the character evaluation of the prospector-applicants, but the determination of eligibility and amounts rests with the DIAND and Yukon officials. The initial approval process takes about one month to complete, and the administration of the grant following receipt of expenditures is also approximately one to two months.³⁴¹ Applications are processed on a first-come, first-served basis, except that citizens of the Yukon have priority over those from out of the territory. According to administrative documents, if an application is considered incomplete, the applicant will be notified, with reasons, within fourteen days of initial receipt, and any revised application will be treated as a new application.³⁴² The Review Committee may, upon application, approve an advance of up to fifty percent of the amount of the contribution.³⁴³ Any person receiving a grant who "without just cause does not submit the information required, or who knowingly submits false information, will be required to refund any advance that may have been made to him, will not qualify for a contribution for that year, and will not be eligible for contributions in future years."³⁴⁴ To the knowledge of government officials charged with the administration of the PAP program, there have been no disputes or problems concerning its operation.

C. Exploration Incentives Program

The Exploration Incentives Program (EIP)³⁴⁵ is designed to allow the investigation of the potential for viable mineral or coal deposits on claims or leases, leading to the determination of drill-indicated tonnage and grade figures. The program is available to individuals, partnerships and junior companies who have no net income from mineral production in Canada. Successful EIP recipients are entitled to a 25% rebate of eligible expenditures for designated (approved) exploration projects carried out on valid mineral properties, up to \$50,000 per project per year to an aggregate of \$100,000 per project over several years.

To qualify, applicants must demonstrate that they have a legitimate interest in the property for which an application is made, and that they have the financial resources necessary to complete the proposed project. Projects must be "designated" by the Review Committee prior to any exploration activity taking place. As with PAP, recipients must enter into a contribution agreement with the Yukon government which outlines the terms and conditions under which the contribution is made, including a provision which calls for maximum utilization of Yukon labour and services. EIP recipients must supply the government with reports and maps. These will be treated as confidential by the government for a two year period following expiry of designation, after which time they will be made available for public inspection. "Grass-roots" exploration activities, such as geological, geophysical and geochemical surveys, trenching, surface and underground drilling, and establishment of a line grid are fully eligible for the 25%

rebate, while one quarter of more pre-production related costs such as shaft sinking, and construction of access roads, etc, are eligible for a 25% rebate. As with PAP, if an EIP application is considered incomplete, the applicant will be notified, with reasons, within fourteen days of initial receipt, and any revised application will be treated as a new application. According to EIP administrators, there have been no disputes or problems with the program's operation.

In 1986-1987, \$710,000 was distributed to 27 different exploration projects (there were 42 applications), and in 1987-1988 \$1 million was allocated to 29 projects (there were 43 applications).³⁴⁶ In both fiscal years, the budget allocated for the program was \$1 million. Applications are reviewed by a committee of DIAND and Yukon Territorial Government officials. As with PAP grants, approval of EIP projects in advance of actual exploration takes about one month and processing following receipt of expenditures takes between one to two months. Applications are processed on a "first-come, first-served" basis, except that individuals based in the Yukon have a priority ^{over} ~~than~~ non-Yukoners.

D. Legal Structure Underlying PAP and EIP

There are no statutes or regulations which expressly apply to PAP or EIP operation. The Financial Administration Act³⁴⁷ provides that no payment shall be made at any time from the consolidated revenue fund for any purpose, unless a provision of this or another Act authorized the payment to be made for that purpose at that time.³⁴⁸ Pursuant to Schedule C to the First Appropriation Act, 1987-1988,³⁴⁹ the Department of Economic Development: Mines and Small Business has been given the statutory mandate to "promote development of a self-sustaining Yukon economy...", to "increase

the participation of Yukoners in employment, management, and ownership of Yukon business..." and to "promote a more equitable distribution of economic benefits throughout all regions..." In schedules to Appropriation Acts, budgetary allocations are provided to the Department of Economic Development: Mines and Small Business.³⁵⁰ These schedules do not specifically refer to any particular program. It would appear that these budgetary allocations included in Appropriation Acts, together with the statements of the mandate of the department also set out in Appropriation Acts, together represent the legislative authority for the Department to administer the PAP and EIP initiatives.

E. Summary Observations

The two Yukon mining exploration incentive programs examined here are relatively new initiatives of the territorial government, and appear to have stimulated exploration in the region. There is little legislative framework underlying the programs, with the result that unsatisfied applicant/recipients, administrators and the public cannot look to any law for guidance as to operation of the programs.

V. The Canadian Exploration Incentives Program (CEIP)

A. Background

On May 3, 1988, the Honourable Marcel Masse, federal Minister of Energy, Mines and Resources, and the Honourable Gerald Merrithew, federal Minister of State (Forestry and Mines) announced the introduction of a new grant program for the oil and gas and mining sectors to be called the Canadian Exploration Incentive Program.³⁵¹ This program is to take effect October 1, 1988 for oil and gas exploration, and January 1, 1989 for mineral exploration.³⁵² The program will be reviewed on December 31, 1990, and may be extended.³⁵³ At the time of the announcement, no draft legislation or regulations had been promulgated; however, according to press releases issued at the time of the announcement, CEIP will draw on the legislative experience of the Canadian Exploration and Development Incentive Program (CEDIP), an existing grant initiative provided to the oil and gas sector.³⁵⁴ Given the fact that CEIP is, at the time of writing, still in the formative stages, what follows is necessarily a tentative, preliminary description of how the program will operate. Discussion here focusses on the mineral industry components of the program. Reference to oil and gas aspects will only be made where this sheds light on mineral exploration.

B. Operation

The primary objectives of CEIP are to improve the ability of junior exploration companies to raise equity in the marketplace and contribute to the economic development of Canada.³⁵⁵ Pursuant to the program, grants of thirty percent on up to \$10 million a year of eligible expenses incurred by qualified companies that finance grass-roots mineral exploration by issuing flow-through

shares will be made available.³⁵⁶ This means that an applicant could receive up to \$3 million per year in CEIP grants. The program is apparently intended to compensate for³⁵⁷ the gradual phasing out of the Mining Exploration Depletion Allowance provided through the tax system and discussed earlier in the paper; in fact, the mineral component of CEIP is scheduled to take effect just as the 33 1/3% MEDA rate is reduced to 16 2/3%.³⁵⁸ It is anticipated that the program will deliver more than \$200 million per year to the junior mining and oil and gas exploration industries, generating more than \$700 million in activity annually.³⁵⁹

The definition of expenses eligible for CEIP will be that described in sub-paragraph 66.1(6)(a)(iii) of the Income Tax Act that are renounced under ss. 66(12.6) or (12.66) of the Income Tax Act.³⁶⁰ Only those expenses incurred pursuant to an arm's length, corporation-investor flow-through share agreement are eligible.³⁶¹ The corporation incurring the expenses has the option of keeping the grant for itself or flowing it through to the investor.³⁶²

To be eligible for CEIP grants, the corporation must have incurred exploration expenses prior to filing an application for payment.³⁶³ The administering department (the Department of Energy, Mines and Resources) has committed itself to a streamlined approval process, with no delays in funding and no pre-approvals necessary before companies enter into flow-through share financing agreements and obtain funding for their programs.³⁶⁴ This having been said, expenses claimed will be subject to verification and audit.³⁶⁵ CEIP will be administered through existing EMR offices located in Calgary and Weyburn, and in new offices to be established in Vancouver, Kirkland Lake, Val-d'Or, Saint John and

St. John's.³⁶⁶ It is anticipated that about one hundred officials will be needed to process CEIP applications: this is about the same number of officials currently needed to process MEDA flow-through tax claims.³⁶⁷

C. The Canadian Exploration and Development Incentive Act Experience

Because the legislative structure of CEIP will be largely based on the existing Canadian Exploration and Development Incentive Act³⁶⁸ (hereinafter "the CEDIP Act"), a brief survey of some of its terms will help shed light on how CEIP will probably operate. Perhaps the single most distinctive feature of the CEDIP Act is the mandatory, non-discretionary nature of CEDIP incentives; section 4 of the CEDIP Act provides that, where an application made in the prescribed form and manner establishes that a qualified person has incurred an eligible expense, "the qualified person is entitled, subject to the prescribed terms and conditions and on the requisition of the Minister, to a payment..." On the other hand, where the Minister is of the opinion that an activity has been done in relation to a CEDIP grant which lacks any "substantial business purpose", the Minister can withhold or refuse payment.³⁶⁹ It seems evident that the legislative drafters were attempting to provide a grant system which operated as automatically as tax deduction systems such as those discussed earlier. On this point, it is interesting to note that the Department of Energy, Mines and Resources have promulgated CEDIP Information Circulars, again resembling the tax model.

A second distinctive feature of CEDIP, when compared with most of the other grant programs available to the Canadian mining

exploration sector discussed in this paper is the comprehensive nature of the legislation: a specific appropriation is provided for in the statute,³⁷⁰ there are extensive provisions detailing the information requirements of applicants,³⁷¹ the powers of government officials to conduct audits and verify claims,³⁷² and even limiting the ability of government to disclose information³⁷³ (generally treated as privileged, except for inter-departmental purposes). Enforcement sections authorize the Minister to withhold part of CEDIP payments or refuse payments altogether in cases of contraventions or failures to comply with the Act or regulations.³⁷⁴ Such contraventions are also offences which upon conviction can lead to fines of up to \$25,000 or imprisonment for up to one year.³⁷⁵ Persons who knowingly supply false information, can on conviction on indictment be liable to a fine of up to one million dollars or to imprisonment for a term not exceeding five years or both.³⁷⁶ The CEDIP Act does not include an express appeal process, or set out remedies available to unsatisfied applicants or recipients.

D. Summary Observations

CEIP has some similarities and differences, when compared with the MEDA tax flow-through arrangement it replaces. First, like the tax deduction system, CEIP is intended to operate in an automatic manner, with little bureaucratic discretion. The amount of the incentive (30%) is roughly the same as the 33 1/3% provided by MEDA, and it applies to the same types of expenses. However, the ceiling of \$3 million makes the incentive of most interest to juniors, and less attractive to the seniors. This is arguably not a serious detracting characteristic of CEIP since seniors can offset much of their costs of exploration against revenue from

production, pursuant to certain income tax provisions. If, as has been indicated in the press releases, the CEIP legislation eventually promulgated is patterned after the existing CEDIP statute and regulations, unsatisfied applicants and recipients will not have the benefit of clearly delineated remedies and appeal processes, such as those associated with the tax system. The fact that CEIP is a cash payment rather than a tax deduction may make the incentive of less interest to certain types of investors.

Conclusions to Part Two: Mining Exploration Grants

Given the diversity evident in the grant programs discussed here, it is difficult and (somewhat foolhardy) to draw overarching conclusions. It has been demonstrated in this part of the paper that the legal framework for exploration grant programs varies from a vote in a schedule to an appropriation act coupled with vague authorizing powers in general departmental legislation (e.g., the MEIP and AMEP components of B.C.'s FAME program) to separate and distinct statute and regulatory regimes, setting out most aspects of incentive operation (e.g., OMEP and CEIP). Incentive programs such as OMEP and CEIP, introduced pursuant to a fairly comprehensive legislative framework allow legislators, government administrators, the private sector and the general public a greater opportunity to determine the nature of program operation, and, where relevant, to predict how the program will likely apply to their own affairs.

With respect to several of the programs surveyed here, there were express declarations that the incentives were discretionary and not automatic (i.e., the Quebec MEFAP, the B.C. FAME and Yukon initiatives) while other programs seemed to thoroughly structure discretion and even expressly indicated that applicants were entitled to payments upon fulfillment of certain conditions (CEIP). None of the initiatives studied set out legal avenues of recourse for dissatisfied applicants or recipients comprehensively in legislation, although one program (OMEP) did include some basic provisions of this sort. With the exception of the CEIP initiative, the other programs were all addressed directly at explorationists, with no apparent prima facie contemplation of investor participation.

Some of the programs were relatively low volume, and modest budget (e.g., FAME and Yukon programs) while others were major and expensive initiatives (e.g., OMEP and CEIP). With the exception of the Quebec program of assistance to prospectors in Bas-Saint-Laurent and Gaspesie, all of the programs were funded by a single level of government. The Quebec programs studied here were the only initiatives which were designed to apply differently in different regions.

Part Three: Legal Analysis of Tax and Grant Incentives

Introduction

As was discussed earlier, from a practical, functional standpoint, tax incentives and grants are similar: both are, in the final analysis, government financial assistance to private individuals and corporations, undertaken ostensibly to achieve certain public policy purposes. In the case of grants, there is a direct, positive expenditure made by government, whereas in the case of tax incentives, the act of assistance (known as a "tax expenditure")³⁷⁷ is a giving by not taking. Although functionally the same, the form is significantly different, and this form can, in turn, be the basis for different legal treatment.

This "form-determining-legal-treatment" phenomenon was perhaps no more clearly demonstrated than in the 1974 tax case of *G.T.E. Sylvania Canada Ltd. v. The Queen*.³⁷⁸ At issue in the Sylvania case was how a provincial tax deduction should be treated for federal income tax purposes. At the time of the case, s. 20(6)(h) of the federal Income Tax Act required that,

...where a taxpayer has received^d or is entitled to receive from a government, municipality or other public authority, in respect of or for the acquisition of property, a grant, subsidy or other assistance ...the capital cost of the property shall be deemed to be the capital cost thereof to the taxpayer minus the amount of the grant, subsidy or other assistance...

The question to be decided in the case was whether the deduction in provincial tax owing could be considered "a grant, subsidy or other assistance" for the purposes of s. 20(1)(h) of the federal Income Tax Act.³⁷⁹ Cattanach, J., speaking for the Federal Court Trial Division, stated that the provincial "legislation may be termed incentive"³⁸⁰[sic], and then, after reviewing definitions of

"grant" and "subsidy" concluded as follows:

....the constant and determining feature in the words "grant" and "subsidy" is that each contemplates the gift of money from a fund by government to a person for the public weal. Something concrete and tangible is to be bestowed....the general words "or other assistance" must be coloured by the meaning of those words....In the present instance what happened was that the Government of Quebec, for reasons of public policy, deemed it fit to forbear from exacting from companies which met certain prescribed conditions, as the plaintiff did, a greater tax under the [Quebec] Corporation Tax Act than might otherwise have been done. *This forbearance to exact a maximum tax as an inducement to manufacturers is different from the act of making a grant or subsidy available to such persons to encourage them to locate in the Province for which reason I conclude that the tax advantage made available by the Quebec Government to the plaintiff is not "other assistance" within the limited sense of those words as used in section 20(6)(h) of the Income Tax Act.*³⁸¹ (emphasis added).

Cattanach, J. does not articulate why or how a "forbearance" is "different" from a grant. An appeal of Cattanach, J.'s decision was dismissed. Jackett, C.J., speaking for the Federal Court of Appeal, stated that...

[i]n so far as the reduction in tax is concerned, the respondent literally received nothing. If a meaning were given to the expression "received ... other assistance" broad enough to include such a reduction in tax, the ambit of the rule in section 20 (6)(h) would be such as to include a reduction effected by various allowances in the Income Tax Act itself that could not, in my view, be taken to have been intended without more explicit language.³⁸²

Thus, in the Sylvania case, the form of an incentive was determinative in it receiving different legal treatment.

In this part of the paper, the legal consequences flowing from determinations of the form of tax and grant incentives are discussed. Then, the application of the fairness doctrine to incentive administration is described and analyzed. Finally, the potential relevance of the Canadian Bill of Rights³⁸³ and Canadian Charter of Rights and Freedoms³⁸⁴ to incentive

programs is examined.

I. Characterization of Tax Incentives

The point of departure for any discussion of the legal character of tax incentives is the fact that the act of taxation is in essence a unilateral taking by government of revenue from individuals.³⁸⁵ Although through a system of "voluntary compliance", taxpayers usually supply a statement of their income and any money owing of their own volition, the fact remains that if there is a failure to report income or supply taxes owed, the government has the legal authority to obtain both the statement of income and taxes owed by force.³⁸⁶ As Patrick Robardet observes in his article "The Canadian Charter of Rights and Freedoms as the Framework for Emerging Bureaucratic Values in Canada: Administrative Responsibility and Activist Public Servants",³⁸⁷ the distinction between coercive instruments such as taxation and non-coercive vehicles such as grants is crucial because...

...coercive measures automatically involve a lack of consensual, or contractual, elaboration and implementation of public intervention, and therefore bring into play the extent to which government unilaterally can affect individual rights in general and constitutionally protected rights and freedoms in particular.³⁸⁸

The "consensual, or contractual" character of grants is a point which will be elaborated upon later in the paper.

The provision of tax incentives (i.e., the disbursement function) is grafted on top of this essentially coercive, unilateral revenue collection vehicle.³⁸⁹ An individual may take advantage of tax incentives, but he must report his income and pay any taxes owing. From a formal perspective this makes for a somewhat uncomfortable hybrid, because a vehicle primarily

designed for a unilateral, coercive taking from individuals can also be a device for giving to individuals.

As has already been described, an important component of the tax system is its elaborate administrative and enforcement structure. In keeping with Robardet's observation regarding coercive acts bringing the rights and freedoms of individuals into play, the position taken here is that the highly developed tax legal-administrative infrastructure is primarily attributable to its penal nature, to ensure that the use of unilateral force by the state is only exercised against the rights and freedoms of individuals where necessary and only to the minimum extent necessary. Thus, for example, in the course of administering tax legislation, government officials are authorized to perform certain activities -- e.g., to make determinations about a taxpayer's income situation, and, where necessary, to determine the veracity of a claim through audits, searches and seizures -- but only after certain procedures have been followed (e.g., give individuals the opportunity to challenge assessments, conduct searches pursuant to warrants, etc.).³⁹⁰ This same, elaborate system is used for the determination of entitlement to tax incentives claimed, and disbursement of tax benefits, but it must be emphasized that the elaborateness of the system can probably be attributable mainly to its fundamentally coercive, taking character: the dispensation features of income tax are supplemental, "special provisions".³⁹¹ It is suggested here on the basis of comparisons with the legal structure associated with existing grant programs that it would be considerably less likely that there would be such a comprehensive system of bulletins, advance rulings, and appeal hierarchy if the tax system were used

solely for the disbursement of public funds.

Income tax legislation is drafted in such a way that persons are, for all intents and purposes, entitled to certain tax deductions if they meet certain conditions³⁹² (e.g., if they have incurred certain expenses, applied for deductions in the proper way, and have not engaged in tax fraud). Typically, administrative discretion is thoroughly structured through the use of advance rulings, regulations, interpretation bulletins, circulars, etc. so that tax administrators merely have a technical discretion enabling them to determine whether or not a taxpayer's claim meets the terms of the legislation. If it does, a deduction will be forthcoming. Where there is some dispute, the mechanisms and institutions for resolution of the dispute have been established by statute. There are no pre-established ceilings set for the overall amount of assistance which can be distributed pursuant to a tax incentive so that taxpayers have to vie for a limited amount of funds.

In short, the coercive, unilateral taking function of any taxation system is its most determinative characteristic. As a consequence of its coercive nature, an elaborate and comprehensive administrative structure is put into place to ensure that the taking is done only pursuant to clearly prescribed procedures which attempt to minimize and control the coercive infringement of individual rights and freedoms as far as possible. The tax incentive function is grafted on this predominantly coercive vehicle, and thus the same elaborate administrative structure designed to control the coercive aspects of taxation is available for the carrying out of dispensation activities. Persons appear

to be entitled to tax expenditures if they fulfill all the prescribed conditions without engaging in fraudulent or evasive behaviour. The combination of statutory language which suggests that persons are entitled to tax deductions under certain circumstances, plus no limit on the amount of assistance which can be disbursed, and the extensive use of bulletins, circulars, advance rulings and appeal procedures to confine administrative discretion results in a system where persons have a legitimate expectation that, upon fulfillment of certain preconditions, they will receive given tax deductions.

II. Characterization of Grants

A. Preliminary Considerations

Above all, a grant is a non-coercive policy instrument: if an individual wants to conduct an activity without the benefit of a grant, he can. If he wants to apply for a grant, he can. There is no unilateral taking of an individual's income associated with the offering of a grant: the income position of a grant applicant is usually not directly relevant to the reception of financial assistance. There are a number of distinctive characteristics peculiar to most grant programs: first, normally grant initiatives have only a limited appropriation, so that not every person who applies for a grant and meets the terms of eligibility will necessarily receive one. Second, the terms of many grant programs leave considerably more discretion in the hands of administrators to determine eligibility than that associated with tax administration. The recently announced Canadian Exploration Incentive Program (CEIP) initiative is an exception to this statement.³⁹³ Third, there is usually a specific statement in the legislation or guidelines which establishes a program declaring

that the awarding of grants is discretionary, not automatic. Again, as has been discussed earlier, it would appear that this statement would not apply to CEIP in the sense that the legislation that eventually establishes the program will probably use language of entitlement, as with existing Canadian Exploration and Development Incentive Program legislation.³⁹⁴ Fourth, the legislation which establishes a program often contains no description of available avenues of recourse in cases of disputes.³⁹⁵ As a result, unsatisfied grant applicants or recipients and third parties looking for relief must usually look beyond the immediate legal and administrative structure associated with grant administration. The extent and form of relief is dependent upon how a grant is characterized.

Over the years, in various jurisdictions, grants have been characterized by courts and legal commentators as everything from gifts, trusts, and contracts to totally new legal instruments in their own right.³⁹⁶ The issue of characterization is not merely academic: flowing from it are determinations of the rights and obligations of the parties involved. For example, if grants are to be considered as no more than gifts, then it would appear that government as donor would possess minimal (if any) obligations to applicants and recipients.

The diversity evident in the description of exploration grant programs given earlier demonstrates the importance of commencing the characterization exercise by examining the statutory language of the program in question. As we have seen, some statutory frameworks provide considerably more legal and administrative detail than others; some programs, such as the newly announced

Canadian Exploration Incentives Program are written in almost "mandatory" language, so that applicants are "entitled" to grants, upon meeting certain conditions. In the American experience, these types of grant programs are referred to as "formula" grants,³⁹⁷ because there is little discretion built into the administrative process.

While the OMEP and CEIP legislative frameworks appear fairly comprehensive when compared to that underlying the Quebec or B.C. programs, in reality none of these programs provides administrators, potential applicants or members of the public with the detail needed to structure day-to-day program operation. For example, in none of the grant programs described is there a legislative framework which deals adequately with the issue of legal recourse for rejected applicants and unsatisfied recipients in the grant administration process. The legislative language used to frame grant initiatives is not particularly enlightening in terms of indicating the legal nature of the grant in question: the exploration grant programs examined in this paper use no wording particularly associated with trusts, gifts, or contracts. The result, then, is that grant programs are typically framed in language which is amenable to characterization as any of a number of legal instruments, and usually does not comprehensively articulate the "rights", remedies, and obligations of the parties involved.

B. Grants as Gifts

One American commentator has speculated that the development of a "law" of federal (U.S.) grant "has been retarded chiefly by

the erroneous but persistent belief" that the federal grant is a gift³⁹⁸:

The misconception presumably leads to the next thought that the donee has, and ought to have few rights assertable in court.³⁹⁹ (emphasis in original text)

Early American cases held that government benefits are "gratutities" or "privileges" which could be withheld or withdrawn on a bureacratic whim.⁴⁰⁰ However, more recent U.S. Supreme Court decisions have rejected the "right-privilege" distinction as having any validity in measuring the protection afforded the beneficiary of a grant initiative.⁴⁰¹

Even on a more theoretical level, there are problems with description of conditional grants as gifts. First, where government is using grants as policy instruments, there are specific restrictions on the "donee's" use of the "gift"; hence, it is a gift "with strings attached". Second, it is not clear that "gifts" from government should be subject to the same doctrinal attention as private gifts, when the relationship between government as donor and private parties as donees is often more formal and discrete (i.e., single time frame, rather than ongoing over many years) in comparison to private gifts situations.⁴⁰² Clearly, characterization of grants as gifts would limit the extent of rights and obligations of parties arising from the relationship.

C. Grants as Trusts

Legal staff to a predecessor board of the present U.S. Department of Health and Welfare theorized that a conditional grant is analogous to a trust, and that "...acceptance of the grant places the grantee under an equitable obligation,

independent of any agreement on his part, to abide by the conditions."⁴⁰³ One advantage to characterizing the grant relationship as a trust rather than a gift is recognition of the tripartite nature of many grants: in traditional trust theory, there is the trustor (i.e., the owner of the property or rights), the trustee (i.e., the person who is the vested holder of the property or rights), and the cestui que trust (i.e., the beneficiary). A potential consequence of such a characterization is that third parties (i.e., members of the public) could sue as cestui que trust to enforce the trust.⁴⁰⁴ On a practical level, however, it is difficult to conceive of government administrators (or would it be grant recipients?) as trustees. It is submitted that characterization of the conditional grant relationship as analogous to a trust is imaginative, but a bit forced.

In a somewhat similar situation, the Supreme Court of Canada has recently considered application of trust principles in a public law context. In *Guerin v. Canada*,⁴⁰⁵ the Musqueam Indian Band in Vancouver brought an action against the federal government for damages arising from an alleged breach of trust in failing to obtain reasonable terms of a lease on lands surrendered by the Band to the government. Dickson, J. (as he then was), with three other judges concurring, held that, while the circumstances of the case did not amount to a trust, the government nevertheless owed a fiduciary obligation to the Band. Dickson, J. found that a breach of the fiduciary obligation had occurred, and that damages should be awarded as if for breach of trust.⁴⁰⁶ Wilson, J., with two other judges concurring, held that an express trust had been created, that breach of that trust had occurred, and that damages were

owing.⁴⁰⁷ Estey, J., held the government liable under agency principles.⁴⁰⁸

The circumstances of the case were quite distinctive, and Dickson, J., in particular, relied heavily on this distinctiveness in reaching his decision. He noted that fiduciary duties generally arise only with regard to obligations originating in a private law context, that the Indians' interest in land is an independent legal interest, not a creation of either the legislative or executive branches of government. According to Dickson, J., the Crown's obligation to that interest is therefore not a public law duty. While admitting that it is not a private law duty in the strict sense either, Dickson, J. asserted that it is nonetheless in the nature of a private law duty.⁴⁰⁹ According to Dickson, J. the conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.⁴¹⁰

It seems self-evident that the peculiar situation of the Musqueam Indians in *Guerin v. Canada* cannot be duplicated in most grant situations, but there is some helpful obiter, should a resourceful lawyer wish to scale the "trust"/grant peak: Dickson, J., quotes with qualified approval from E. Weinrib's article, "The Fiduciary Obligation":⁴¹¹

...I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary... It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.⁴¹²

Extracted from its original context, Dickson, J.'s line of reasoning could be applied by grant beneficiaries (i.e., conceivably grant recipients or in certain cases members of the public affected by the giving of the grant) to compel government officials responsible for the administration of a grant program to, for example, enforce the terms of a grant agreement.

Wilson, J., in the course of finding an express trust to exist in *Guerin v. Canada*, is mindful of the distinctive situation of the Musqueam Indians.⁴¹³ The net effect of *Guerin v. Canada* would appear to be an evident willingness on the part of the Supreme Court of Canada to find a fiduciary obligation or a trust obligation binding on government, but only in extremely unusual circumstances not likely to be duplicated in the typical government-private sector grant context. In short, the proposition that grants are a type of trust, or that the grantor-grantee-third party relationship creates an enforceable fiduciary relationship among the parties is a long-shot gamble, best reserved for only the most capable of counsel in the most favourable of fact-situations.

D. Grants as Contracts

In situations such as that associated with OMEP, CEIP, the British Columbia FAME initiatives, the Quebec programs, or the Yukon assistance discussed earlier, the relationship between government and grant recipient in some ways closely resembles that of a contract: there is a written agreement between the two parties and consideration (i.e., in exchange for the grant, persons agree to explore in accordance with government

specifications), However, some American commentators are wary of such a characterization. Richard Capalli, author of "Federal Grant Disputes: The Lawyer's Next Domain", comments that the existence of grant agreements may beguile persons into thinking of the grant as just a specialized type of contract. Capalli feels that characterizing grants as special types of contracts overlooks some "critical distinguishing factors", including the fact that the rights and responsibilities of parties to a grant are primarily established by instruments outside the agreement:

The agreement plays the limited role of signaling the start of the grantor-grantee relationship, fixing certain items such as project period, grant amount, and budget, and specifying any special conditions the grantor may have decided to impose on the recipient...⁴¹⁴ (footnotes omitted)

While Capalli may be correct in highlighting the limited nature of a grant agreement when compared to standard contracts, there would appear to be no obstacle preventing courts from characterizing a grant agreement as a contract which "referentially incorporates" terms contained outside the agreement (e.g., in guidelines or regulations).

Another American grants commentator supplies the following rule of thumb for distinguishing grants from contracts:

It has been said that the grant is the proper mechanism when the program to be advanced is that of the grantee, the contract when the Government's own work is to be done.⁴¹⁵

In the case of exploration grants, the program advanced is that of the grantee, but the information disclosure requirements attached to the issuance of the grant mean that government is at the same time getting work done (i.e., determining whether there is or is not minerals on a particular property usually belonging to the Crown).

In American jurisprudence, a distinction is drawn between public and private contracts.⁴¹⁶ Enforcement by third party beneficiaries of public contracts has been endorsed by U.S. courts.⁴¹⁷ Canadian and British courts have to date chosen to not make the public/private contract distinction, with the result being that traditional notions of privity of contract continue to apply and thus prevent third party involvement in public contracts.⁴¹⁸

E. Grants as a New Legal Instrument

It has been suggested by an American commentator (Capalli) that grants are a creature of statute and that the traditional doctrines associated with legal instruments such as contracts do not apply:

To understand the nature of the grantor-grantee relationship one must first divest oneself of any and all doctrines and ideas derived from the law of contracts, trust, partnerships or gifts. Federal grant law is purely statutory...⁴¹⁹ The basic point here is that federal grant law is one of statutory interpretation and not one of contract interpretation...the parties to a grant do not bargain its terms. Activities, amount, term, conditions, modification rules, and dispute procedures are all unilaterally determined in a federal grant.⁴²⁰

While this approach may have its merits in the U.S. -- where courts have taken a more active role in interpreting grants,⁴²¹ where grant statutes have tended to be more comprehensive,⁴²² and where an Administrative Procedure Act addresses aspects of grant operation⁴²³-- the likelihood of Canadian legislators and courts following this lead seems, in the immediate term, remote. Perhaps the introduction of large volume, structured grant programs such as CEIP will hasten Canadian judicial recognition of grants as new legal instruments. It is interesting to note the similarities

between Capalli's comments about the statutory and non-contractual nature of U.S. federal grant law, and the following remarks concerning statutory interpretation of Canadian tax law excerpted in Grover and Iacobucci's Material on Canadian Income Tax (6th ed.):

The proper interpretation of a taxing statute is a difficult and technical matter, and subject to rules somewhat different than those that apply in the interpretation of statutes of other types. The reason for the differences is that tax law is an artificial, man-made concept. Consequently the rules are artificial and have no validity out of the context of taxation or outside the general framework that Parliament is seeking to establish by their use.⁴²⁴

Although one may quibble with the characterization of tax law as an "artificial, man-made concept" (quare what aspect of law isn't artificial and man-made?), the same type of comment could arguably be made with respect to (comparatively) comprehensive and elaborate, tax-like grants such as the Canadian Exploration Incentives Program. Whether a Canadian court will arrive at this type of conclusion in the near future is a debatable point.

F. Summary Observations

Answering the question of "Just what is a grant?" is a preliminary step to determining the rights and obligations of parties involved or wanting to be involved in the grant administration process. The description of exploration grant initiatives given earlier reveals that the legislative frameworks vary in terms of the detail which they provide concerning program operation.

In Canada, the judicial slates are relatively clean: because there has been no judicial determination exactly on point to date,

it appears courts are free to interpret grants as gifts, trusts, contracts, or as entirely new instruments. If courts choose to characterize a particular grant as a gift, there would appear to be few legal obligations attaching to the donor (government), and few if any legal remedies available to the donee. Conceptualizing grants as trusts or as involving a fiduciary obligation binding upon government administrators is interesting in that it could lead to recognition of three parties to the agreement (i.e., government, grant recipient, and general public as cestui que trust); in fact, characterization of third parties (i.e., members of the general public) as cestui que trust could allow them to sue to enforce the trust. However, the likelihood of Canadian courts approving of such a potentially far-reaching interpretation of grant relationships is small.

A major problem with the characterization of grants as contracts is the fact that, in Canada, there has been no judicial recognition of a distinction between private and public contracts, and thus the traditional notions of privity of contract would probably prevail to prevent third party involvement. One American commentator (Capalli) has suggested that grants are separate instruments in their own right, deriving all their force from the statute which authorizes their existence, the grant agreements themselves, and other relevant statutes. This approach is more feasible in the U.S. than in Canada because American grant statutes tend to be more comprehensive than their Canadian counterparts, U.S. courts have generally adopted a more sympathetic attitude toward liberal interpretation of grants and grant remedies, and there is an Administrative Procedures Act which addresses aspects of grant administration. In short,

Canadian courts have a number of options available to them. Which interpretation is eventually adopted may depend more on the specific circumstances of the case to be decided upon than some clear and overriding conception of the implications of their decision.

III. The Application of the Fairness Doctrine to Tax and Grant Administration

A. General

In the 1979 decision of *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police et al.*,⁴²⁵ the Supreme Court of Canada, following the lead of the English courts, formally recognized the notion that there may be a procedural duty on administration to act fairly, a duty which does not depend for its existence on there first being a finding that a judicial or quasi-judicial (as opposed to an administrative action) had taken place. Laskin, C.J.C., speaking for the Supreme Court of Canada, stated:

I accept, therefore, for present purposes and as a common law principle what Megarry, J., accepted in *Bates v. Lord Hailsham*, [1972] 1 W.L.R. 1373 at p. 1378, "that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness."⁴²⁶

When this duty of procedural fairness applies, and what it constitutes are two questions which decisions since *Nicholson* are beginning to "flesh out".⁴²⁷ In the 1979 Supreme Court of Canada case *Martineau v. Matsqui Institution Disciplinary Board*,⁴²⁸ Dickson, J. (as he then was) observed that natural justice and procedural fairness should be viewed as a continuum, not as two separate and distinct concepts.⁴²⁹ Dickson, J., also commented on the use of *certiorari* as the primary remedy to be used in relation to issues of procedural fairness:

Certiorari is available as a general remedy for supervision of the machinery of government decision-making. The order may go to any public body with power to decide any matter affecting the rights, interests, property, privileges, or liberty of any person. The basis for the broad reach of this remedy is the general duty of fairness resting on all public decision-

makers.⁴³⁰

For tax or grant incentive administration to fall within the scope of the fairness doctrine it would appear to be necessary to establish that an administrators' decision in relation to the provision of a tax or grant incentive affects a right, interest or privilege of an individual. This may be easier with respect to certain incentives (eg. the Canadian Exploration Incentives Program) than others (eg. the British Columbia FAME initiative). More will be said on this issue *infra*.

The content of procedural fairness would appear to be highly variable, depending upon the particular statutory context in question. In a recent article, Professor David Mullan, after surveying and analysing cases since Nicholson, observed that "courts are looking far more closely at confidentiality and non-disclosure claims",⁴³¹ and then added...

[w]hat the prison, parole and university cases and the growing unwillingness of the courts to entertain claims for non-revelation of information also tell us is that there may be an irreducible minimum component of procedural fairness, namely, the right of those affected to sufficient information as to and notice of the contrary evidence and arguments to enable the effective presentation of the contrary case.⁴³²

It should be stressed that prison, parole and university cases all represent somewhat formal decision-making contexts when compared with most grant or tax incentive administrative situations. In the same article Mullan concluded with an articulation of "the recognized core values"⁴³³ of procedural fairness:

...adjudicatory independence and the right of those affected to sufficient notice of the relevant issues and evidence to enable effective participation in the sense of an opportunity to present contrary evidence and arguments....Within the basic core values, however, there is much room for modification and variation...⁴³⁴

The issue of what procedural obligations attach to the

administration of tax deductions and grants raises many questions, both on a theoretical and practical level. Unfortunately, only the most important of these can be addressed here. It is suggested that three major stumbling blocks which could prevent courts from attaching beneficial procedural obligations on tax deduction and grant administration are as follows:

- (1) grappling with the distinction between privileges and rights;
- (2) deriving duties or obligations for a Minister to distribute grants or tax deductions, to supply reasons for decisions, to give an opportunity to reply, etc. on the basis of legislation and guidelines which provide variable (and usually minimal) guidance;
- (3) finding reasonable parallels for extending the fairness doctrine to grant and tax deduction situations, such as fairness in the granting of permissions (e.g., licences) and in the soliciting of tenders for contracts.

These three issues are the subject of discussion below.

B. Privileges vs. Rights

Grants and tax deductions, being examples of "government largesse", do not easily fit within a legal system which focuses on the concept of rights. This is well demonstrated by the following excerpt from an American administrative law treatise:

The notion of "privileges" has created a great deal of uncertainty about the permissible mechanics of government. If the government was not obliged to give something in the first place, then if it did in fact give that thing, it merely conferred a privilege rather than recognized a right. A donee of a gift -- a privilege -- could not complain if, after a time, the donor chose not to continue his generosity. Moreover, the donor (that is, the government) could make his gift (that is, confer a privilege) on whatever conditions he might choose. The donee need not accept the gift, but

if he did accept it, he took it on the terms set by the giver.⁴³⁵

K.C. Davis, in his seminal *Administrative Law Text* has commented that the idea of privilege seems rather clearly to be something more than a mere label that is attached after the solution of a legal problem has been worked out on other grounds. Davis states that the typical thinking is that one has no "right" to a government gratuity, that one who has no "right" at stake should not be entitled to a hearing, that in absence of a "right" one should not even be entitled to judicial review of an administrative denial of the gratuity or privilege, that due process protects only "life, liberty, or property" and not privileges, and that therefore courts are not called upon to require fair hearings when nothing more than privileges are at stake.⁴³⁶

Judging by the statements of these two American commentators, the legal environment pertaining to grants qua privileges, appears inhospitable indeed. Moreover, Canadian courts appear at least as unreceptive toward the notion of judicial scrutiny of privilege situations as are the American commentators. In *Dowhopluk v. Martin*⁴³⁷ (1971) (cf. decided prior to *Nicholson*), the Ontario High Court was considering whether it should review a citizenship application by an alien who had lived in Canada for many years. Addy, J., speaking for the court stated:

...citizenship is not a right but a privilege⁴³⁸....If the plaintiff were entitled to citizenship as of right I would be inclined to the view that he would be entitled to a fair hearing, but, as stated earlier, such is not the case.⁴³⁹

In practice, however, the distinction between right and privilege is not near as clear-cut as the above-cited comments might appear to suggest. K.C. Davis notes:

The [American] courts do not classify all interests as either rights or privileges; instead they often give legal protection to what they persist in calling privileges.⁴⁴⁰

In de Smith, *Judicial Review of Administrative Action* (3rd edition, 1973), it is suggested that "rights" must be understood...

...in a very broad sense... It comprises an extensive range of legally recognized interests, the categories of which have never been closed...⁴⁴¹

Emerging from de Smith's suggestion is the notion of "actionable interests", as opposed to the in-out distinction between rights and privileges. The above-cited passage from de Smith was quoted with approval by Clement, J.A., speaking for the Alberta Supreme Court Appeal Division in *Re Harvie and Calgary Regional Board of Planning*⁴⁴² (1978), although it should be noted that Clement, J.A. was in that case considering neither a grant/tax deduction nor a privilege situation.

The "privilege/right" distinction seemed to be lurking behind the recent federal Court of Appeal decision of *Scarborough Community Legal Services v. The Queen*,⁴⁴³ where the court held that the Minister of National Revenue was not obliged to give a hearing with respect to an application for registration for charitable organization status pursuant to the federal Income Tax Act. Status as a charitable organization has a number of tax benefits: qualifying institutions are exempt from tax, plus donations made to them are deductible by donors in computing their own taxable incomes.⁴⁴⁴ The appellant legal clinic was denied charitable status, and claimed that the decision by M.N.R. breached the rules of natural justice or procedural fairness in that the decision was reached without giving prior notice of the case against it and an

opportunity to meet that case. As well, the appellant alleged an error of law was made by the Minister, but ~~this is~~ not germane to discussion here. It should be noted that the Income Tax Act provides that upon refusal of the Minister to register an entity as a charitable organization, an appeal lies to the Federal Court of Appeal.

Applying the criteria set out in *M.N.R. v. Coopers & Lybrand*,⁴⁴⁵ Marceau, J., (who along with Urie, J., dismissed the appeal) held that the Minister's function in denying charitable status constituted a purely administrative act.⁴⁴⁶ Requiring a hearing would be to go beyond Parliament's will as reflected in the legislation. Justice and equity would not be better served by requiring a hearing.⁴⁴⁷ Marceau, J. seemed to be strongly influenced by the fact that the statute did set out an appeal procedure in certain circumstances:

If the decision is wrong because the law was improperly applied to the facts or because improper qualification was attributed to those facts, the appeal will remedy the situation; and if the decision is wrong because of a failure by the applicant to give all the facts or to expose them correctly, there is nothing to prevent him from renewing his application.⁴⁴⁸

Urie, J. and Marceau, J. distinguished the case from *Renaissance International v. Minister of National Revenue*,⁴⁴⁹ where it was held that a revocation of charitable status was a decision which required notice and an opportunity to be heard. With respect to the differences between *Renaissance* and *Scarborough*, Urie, J. observed as follows:

First, and most importantly, as I see it, in that case *Renaissance* had been for some time registered as a charity so that the revocation of its registration took away from it an important *privilege* which it, and donors to it, had had for some time. From the fact of that registration there flowed other benefits to the organization such as, for example, the ability to indulge in financial planning for its charitable

activities which might well lose in part if donors to it lost the *right* to claim deductions for their donations. Those benefits, as a matter of fairness, ought not to have been terminated without giving the beneficiary of them at least the opportunity to know the reasons for the proposed revocation and to make representations with respect thereto. *Clearly, no such rights can have accrued to an applicant for registration.*⁴⁵⁰ (emphasis added).

The dissenting judge in the Scarborough case, Heald, J., maintained that the decision regarding registration as a charitable organization was quasi-judicial in nature,⁴⁵¹ and that "natural justice or the duty to act fairly would require, perhaps, a telephone call or a letter to the appellant advising of the Minister's difficulties or problems with the application, thus giving the appellant the opportunity to, at least, attempt to answer the Minister's objections."⁴⁵² It can be seen that the essence of the dissenting position of Heald, J. resembles the "recognized core values" of procedural fairness espoused by Mullan and discussed earlier in the paper.

Following the reasoning of the majority in Scarborough, it would appear that a Ministerial decision with respect to eligibility for an exploration tax deduction would depend on whether the ability of the taxpayer to apply for a deduction could be described as a "right", so that as a result the Minister would be under an obligation to give notice and an opportunity to be heard to the applicant prior to making a determination. With the exception of the CEIP initiative (which if it follows the CEDIP form will expressly use the word "entitlement"), the likelihood of courts characterizing any of the mining exploration grants discussed in this paper in terms of rights appears small.

Although there is evidence of growing recognition that the

privilege/right distinction is too black and white for practical application to decisions regarding "government largesse", cases such as Scarborough demonstrate that the notions of privileges and rights continue to influence procedural fairness decisions.

C. Finding an Obligation to Act Fairly in Tax Incentive and Grant Administration Situations

The brief survey of cases provided below is intended to illustrate how far courts have been prepared to extend the obligations of procedural fairness in the awarding of tax incentive, grant or similar administrative situations. Due to a paucity of cases dealing specifically with grants or tax incentives, decisions involving situations somewhat analogous to the awarding of incentives are also included.

In *British Oxygen Co. v. Minister of Technology*⁴⁵³(1971), the House of Lords were considering an incentive scheme similar in some respects to the mining exploration grant programs discussed earlier in the paper. Pursuant to an English industrial development act, a government entity ("the Board") was authorized to make grants to industry. British Oxygen claimed that it had a right to a grant, because it had met all relevant conditions for eligibility. Lord Reid, with whom the majority of the court agreed, stated:

I cannot find that these provisions give any right to any person to get a grant. It was argued that the object of the Act is to promote the modernization of machinery and plant and that the Board were bound to pay grants to all who are eligible unless, in their view, a particular eligible expenditure would not promote that object. That might be good advice for an advisory committee to give but I find nothing in the Act to require the Board to act in that way. If the Minister who now administers the Act, acting on behalf of the Government, should decide not to give grants in respect of certain kinds of expenditure, I can find nothing to prevent him. There are two general grounds on which the

exercise of an unqualified discretion can be attacked. It must not be exercised in bad faith, and it must not be so unreasonably exercised as to show that there cannot have been any real or genuine exercise of the discretion.⁴⁵⁴

Note that Lord Reid characterizes the statute in consideration by the House of Lords as authorizing *unqualified* Ministerial discretion. It would appear that Canadian courts could apply the same type of reasoning with respect to many of the mining exploration grant programs examined earlier, where very little if any legislative guidance is provided as to how the grants are to be distributed. On the other hand, the newly introduced Canadian Exploration Incentive Program, if drafted using language of entitlement and detailed eligibility provisions similar to existing CEDIP legislation (as discussed in Part Two of the paper, *supra*), would appear to be distinguishable from the unqualified discretion characteristic of the legislation under examination in the British Oxygen case.

In *Re Maple Lodge Farms Ltd. and Government of Canada et al.*⁴⁵⁵ (1980), the Federal Court of Appeal considered whether the federal Minister of Industry, Trade and Commerce had any discretion at all to refuse chicken import permits applied for and if he did, whether he refused to issue the permits in question for irrelevant reasons. The Court held that the Minister had discretion, that the Minister was entitled to promulgate and refer to guidelines as a general rule in the exercise of his discretion (*British Oxygen* is referred to with apparent approval) provided he cannot fetter his discretion by treating the guidelines as binding upon him and excluding other valid or relevant reasons for the exercise of his discretion.⁴⁵⁶

Courts have gone to considerable lengths to find policy binding upon seemingly unfettered discretion. The case of *Padfield v. Minister of Agriculture, Fisheries and Food*⁴⁵⁷ (1968) concerned the discretion of a Minister to refer a complaint to an investigatory committee, pursuant to the terms of the English Agricultural Marketing Act, 1958. The House of Lords held (4:1) that Parliament conferred a discretion on the Minister so that it could be used to promote the policy and objects of the Act (which the court discerned from reading the provisions of the Act). The House of Lords further held that though there might be reasons which could justify the Minister in refusing to refer a complaint, his discretion was not unlimited and, if it appeared that the effect of his refusal to refer the complaint to the investigatory committee was to frustrate the policy of the Act, the Court was entitled to interfere.⁴⁵⁸ The Minister was ordered to consider the complaint according to law.

The *Padfield* case was referred to in *Moser v. R. in Right of British Columbia*⁴⁵⁹ (1982), where the discretion of the B.C. Minister of Highways to extend a road through the subject's property pursuant to the *B.C. Highway Act*⁴⁶⁰ was under consideration. Hinds, J., speaking for the B.C. Supreme Court, concluded that absolute ministerial discretion (such as in the *Moser* case) will usually afford no procedural protection, and any attack upon such a decision would have to be founded upon abuse of discretion.⁴⁶¹ The Court held that, on the facts of the case, the Minister's actions in applying provisions of the Highway Act to the petitioner's property, and in negotiating a "relocation" for the road in question with the petitioner, constituted abuses of

discretion.⁴⁶² Courts generally tend to exhibit a greater willingness to intervene in the decisions of administrators when propriety interests are involved.⁴⁶³

In short, for courts to find procedural obligations binding upon discretionary processes such as most grant or tax incentive administration, they will typically look first to statutory language indicative of a "right" to assistance (eg., is the word "right" or "entitlement" used in the legislation?) and then look to policy as enshrined in legislation and guidelines. Courts may be sensitive to actions which can be interpreted as frustrating the policy of legislation in question; moreover, courts appear alert to the possibility of administrators inadvertently binding themselves to non-legal guidelines. Finally, courts may interpret actions contrary to a plaintiff's interests as an abuse of what appears to be relatively unfettered discretion.

(1) Analogous Cases

With so little Canadian judicial discussion directly on the subject of procedural obligations attaching to the administration of tax deductions and grants, the judicial treatment of legal situations analogous to such administrations becomes a "next best" option worthy of exploration. In this context, three situations roughly similar to the awarding of tax incentives and grants are those associated with the granting of permissions (e.g. permits and licences), the soliciting of tenders for government contracts, and the withholding of benefits (e.g., low-rent public housing). These three analogous situations are briefly canvassed below.

(a) Granting of Permissions

In *McInnes v. Onslow Fane*⁴⁶⁴ (1978), the English Chancery Division considered what procedural obligations attached to the granting of licences by a non-governmental, unincorporated body which regulates boxing in England (the British Boxing Board of Control). The key legal issue under discussion in the case was: what are the procedural requirements where there are no provisions of any statute or contract either conferring a right to the licence in certain circumstances, or laying down the procedure to be observed, and the applicant is seeking from an unofficial body the grant of a type of licence that he has never held before, and, though hoping to obtain it, has no legitimate expectation of receiving?⁴⁶⁵ Although it is self-evident that there are significant differences between this licensing situation and the mining exploration tax incentive and grant awarding situations (discussed further infra), the basic similarities (e.g., no provisions conferring a right, no procedure set out) make the case relevant to many of the incentives discussed in this paper. Megarry, V.C., speaking for the court, went on to say that there were many reasons why a licence might be refused to an applicant of complete integrity, high repute and financial stability; that some may be wholly unconnected with the applicant, as where there are already too many licensees for the good of boxing under existing conditions; that other reasons will relate to the applicant and may be discreditable to him, as where he is dishonest or a drunkard; or they may be free from discredit, as where he suffers from physical or mental ill-health, or simply lacks the personality or strength of character required for what no doubt may be an exacting occupation. Megarry stated that there

may be no 'case against him' at all, in the sense of something warranting forfeiture or expulsion; instead, there may simply be the absence of enough in favour of granting the licence, that in most cases the more demanding and responsible the occupation for which the licence is required, the greater will be the part likely to be played by considerations of the general suitability of the applicant, as distinct from the mere absence of moral or other blemishes. The more important these general considerations are, the less appropriate does it appear to be in Megarry, V.C.'s opinion to require the licensing body to indicate to the applicant the nature of the 'case against him'.⁴⁶⁶

Megarry, V.C. concludes that there is no obligation binding on the Board to give the plaintiff even the gist of the reasons why they refused his application, or proposed to do so. Megarry remarks:

I think that the courts must be slow to allow any implied obligation to be fair to be used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the courts. This is so even where those bodies are concerned with the means of livelihood of those who take part in those activities. The concepts of natural justice and the duty to be fair must not be allowed to discredit themselves by making unreasonable requirements and imposing undue burdens. Bodies such as the board which promote a public interest by seeking to maintain high standards in a field of activity which otherwise might easily become degraded and corrupt ought not to be hampered in their work without good cause. Such bodies should not be tempted or coerced into granting licences that otherwise they would refuse by reason of the courts having imposed on them a procedure for refusal which facilitates litigation against them.⁴⁶⁷

Clearly, major distinguishing factors between McInnes and typical tax incentive and grant situations are the fact that McInnes involved a non-governmental granting body, a licensing rather than

a financial expenditure, and the total absence of prescribed legal criteria of entitlement attaching to the permission in question. Still, however, it is submitted that the *McInnes* case stands for the proposition that courts are generally loathe to interfere with decisions of more specialized bodies who dispense benefits, unless there are some explicit indications of unfairness (such as contravention of prescribed standards).

In Canada, legal treatment of government decisions to award permits or licences appears unsettled. Thus, for example, in *Re Maple Lodge Farms Ltd. and Government of Canada et al*⁴⁶⁸, the Federal Court of Appeal held that the Minister had discretion to issue or reject chicken import permits, and to promulgate guidelines concerning the permits. It was held by the court that the Minister could exercise his authority to issue or reject applications for permits so as to achieve the policy of the Act. The court outlined a number of relevant considerations which the Minister could take into account in reading a permit application decision, but did not make any direct reference as to what types of procedural obligations (e.g. the "right" to reason, to respond) were binding on the Minister.

Cattanach, J., in the Federal Court Trial Division decision of *Ghuman v. Minister of Transport et al*⁴⁶⁹ (1983) suggests (in obiter) that limited procedural duties are owed by licensing authorities in the granting of airport taxi licenses. Cattanach, J. stated that, broadly speaking, the airport general manager functions as a licensing authority and granting a licence may be assimilated to that of a call for tenders. He considers applications as bids are considered and exercises his discretion

accordingly in making an award.⁴⁷⁰ Cattanach went on to say that:

Thus I should think he is at the other end of the spectrum and his role in granting licences or authorizations is akin to that of an executive licensing authority free from express procedural duties and under no implied duty to observe the rules of natural justice.

This is predicated upon the concept that the grant of a licence is a privilege.⁴⁷¹

The conceptual and contextual leap from cases concerning the awarding of licences to those concerning the awarding of contracts for tenders has a certain immediate appeal, but, it is submitted that there are significant differences between the two types of government actions which can make such leaps perilous. On this point, more will be said in the next section.

(b) Calls for Tenders

In *Allard Contractors Ltd. v. District of Coquitlam et al.*⁴⁷² (1983), an unsuccessful applicant for a government call for tenders (a sale of land) commenced an action against the municipality who called for the tenders. The plaintiff claimed, inter alia, that the municipality had failed to act fairly in considering certain evidence concerning the plaintiff's tender, in failing to give the plaintiff an opportunity to know and controvert the evidence, and in not giving the plaintiff sufficient opportunity to waive certain terms and refine his offer.

Locke, J. speaking for the court, held that, short of a general duty of good faith (i.e., no evidence of fraud or improper motive or collusion)⁴⁷³ the sale of the subject land did not require the rules of fairness to be applied:

...I cannot bring myself to the opinion that fairness or natural justice is required in this ordinary everyday commercial process -- free and unfettered as I see it -- with the exceptions that I have set out. I think, therefore, that the whole is indeed an executive act. I do not, therefore, think that Allard or any other person

was entitled to be represented at the in camera meeting of council to indicate his views in opposition to those which might be advanced against him. I do not think that his case displays or indeed comes near to the admittedly incomplete criteria quoted by Mr. Justice Dickson [in *M.N.R. v. Coopers & Lybrand* (1978) (SCC) discussed earlier]. And in particular for myself I have some difficulty in finding any "right" of the petitioner Allard or of anyone else other than that of an opportunity of going and making an offer to council. Nor, of course, do I find any penalty civil or criminal attached thereto.⁴⁷⁴

In another tender for contract situation, in *Transhelter Group Inc. v. Committee on Works and Operations*⁴⁷⁵ (1984), the Manitoba Court of Appeal dismissed an application for certiorari to quash the awarding of a contract.⁴⁷⁶

As enunciated in the reasons for decision of Locke, J., in *Allard*, there would appear to be a fairly sound rationale behind the resistance of courts to attach procedural fairness obligations to commercial operations of government. A key distinguishing factor between commercial tender for contract and grant/tax incentive situations is the fact that the primary objective of government commercial contracts is the efficient provision of goods or services to the government, whereas the primary objective in the awarding of grants or contracts is presumably the fulfillment of public policies. In the carrying out of judicial, quasi-judicial and administrative functions towards the achievement of public policy aims -- be it enforcement of regulatory legislation, processing of immigration status and citizenship claims, or the awarding of permits, or grants and tax deductions -- the adherence of decision-makers to at least a minimum core of procedural fairness values, and not just administrative efficiency, can be justified. It is in this sense that the *Ghuman* decision (discussed supra) might be a dangerous step: the

awarding of airport taxi licenses can be characterized as primarily a commercial activity, and thus in the particular case efficiency might be a paramount value over procedural fairness. But the same cannot be said for the awarding of many other government permissions (e.g., air, water and land use permits, northern exploration licenses, etc.) and the provision of government benefits.

(c) Withdrawal of Benefits

While the granting of permissions and calls for tenders cases are roughly similar to the administrative processes of awarding grants or tax deductions, the withdrawal of benefits cases are more analogous to withholding of grant situations or withdrawal of tax deduction privileges (e.g., where disbursement of grant monies is for some reason "prematurely" terminated, or where a favourable tax status is removed).

In *Re Webb and Ontario Housing Corporation*⁴⁷⁷ (1978), the Ontario Court of Appeal held that, while the Ontario Housing Corporation is under no procedural obligation of fairness with respect to an application for a lease for low-rent housing, once that applicant becomes a tenant and thus qualifies for or receives a real benefit of reduced or subsidized rent, the Corporation must act fairly in deciding whether to terminate the lease.⁴⁷⁸ The Court noted that there was a statutory right to receive assistance if the plaintiff satisfies the eligibility requirements in the statute and that, if he is not satisfied with the determination made at the first stage, he has a right to a hearing before a review tribunal.⁴⁷⁹ The Court referred with approval to the judgement of Le Dain, J. (then of the Federal Court of Appeal) in *Inuit Tapirisat of Canada et al. v. Leger et*

al.⁴⁸⁰ (1978), and said ...

... what is in issue in these cases is what is appropriate to require of a particular authority in the way of procedure, given the nature of the authority, the nature of its power and the consequences of the exercise of that power to the individuals affected, and, I would add, the nature of the relationship between the authority and the individuals affected...⁴⁸¹

The Court held that the Ontario Housing Corporation acted fairly when it made the tenant aware of the complaints giving rise to the proposed termination and gave the tenant an opportunity to remedy the complaints and to respond to them.

The facts of the *Webb* case are quite distinctive and sympathetic, and could perhaps lead one to believe that in a more business-oriented fact-situation, courts would be less likely to find any significant duties of procedural fairness. However, in several subsequent business-oriented cases, courts have reached conclusions similar to that in *Webb*. In *Renaissance International v. Minister of National Revenue*⁴⁸² (1983), which dealt with the withdrawal of tax charitable status, the Federal Court of Appeal held that the Minister of National Revenue was acting quasi-judicially, and was obligated to notify the charitable organization of its intentions to withdraw the charitable status and receive input from the organization in question. In *Garand v. Société d'Habitation du Québec*⁴⁸³ (1984), the Quebec Superior Court held that, after a company had been accepted in a registry for government contracts, and had because of its registered status bid on and been rewarded a contract, then any revocation of the contract or possibly even mere removal from the registry could be considered a judicial decision, and thus the authorities must give the company an opportunity to hear and respond to the reasons for the removal of registered status and

withdrawal of the contract.

In the administrative processes associated with the awarding of exploration tax deductions or grants discussed in this paper, there was not an initial registration or "entitlement to receive" procedure in place, similar to the cases discussed here. What emerges from examination of these cases is that the courts appear to be considerably more sympathetic to claims of breaches of procedural fairness with respect to situations involving the withdrawal of financial assistance (in the sense that a "legitimate expectation" has been created), than to initial applications for assistance. Those incentives which most closely resemble an entitlement situation, such as the new Canadian Exploration Incentive Program and tax deductions would seem to be more likely to attract useful procedural protections (eg., an opportunity to hear and respond to reasons) in withdrawal situations.

(2) Summary Observations

Three preliminary issues whose resolution could significantly affect meaningful application of the procedural fairness doctrine to tax deduction or grant administration are:

- (1) coming to grips with the traditional legal distinction between privileges and rights;
- (2) finding procedural obligations binding on administrators;
- and
- (3) drawing parallels from analogous situations which have received judicial comment.

It was suggested that a black/white privilege/right distinction appears to no longer be appropriate for treating "modern"

phenomena such as government tax deductions and grants. Instead, courts are beginning to look to whether "actionable interests" are involved, and are affording basic protections (such as providing reasons for decisions and giving the affected party and opportunity to respond) on that basis. Legal commentators in England and courts in the U.S. have indicated a willingness to resolve the "government benefits" privilege problem in this manner.

In determining what if any procedural obligations attach to the grant administration process, courts will typically look first at the statutory language associated with the giving of the assistance (eg., are the words "right" or "entitlement" to assistance used?) and then to the policy underlying the assistance, as enshrined in legislation and guidelines. Courts appear to be sensitive to government actions which can be interpreted as frustrating the policy in question, and are alert to administrators inadvertently binding themselves to non-legal guidelines. Finally, courts may find that certain government actions constitute abuses of discretion.

Three possible fact/legal situations which courts (and others) could turn to for guidance in their approach to tax deduction and grant situations, are ~~the legal~~ treatment of the granting of permissions, calls for government tenders, and withdrawals of benefits. On the basis of a brief examination of analogous cases in this area, it can be concluded that the application process probably would not attract serious legal procedural safeguards in the absence of clear statutory indicia that this was intended, while withholding or terminating funding

might attract a certain minimum obligation on the part of administrators to apprise the benefit-holder of the case against him and provide him with an opportunity to respond to the facts which gave rise to the possible termination.

On the basis of this analysis, it would appear that the particular procedural fairness obligations which might attach to tax or grant administrators depend upon such factors as:

- (1) what aspect of the administration process is in question (e.g., is it an application, a termination or a withdrawal?);
- (2) the nature of the grant or tax deduction (is there language suggesting entitlement in the statute, regulations, or guidelines?);
- (3) the nature of the relationship between the administrators and the applicant or benefit holder (e.g. will withholding of the benefit seriously detract from the applicant/holder's livelihood?).

Given the embryonic state of current procedural fairness jurisprudence, this list is necessarily tentative.

IV. Application of Canadian Bill of Rights⁴⁸⁴ and Canadian Charter of Rights and Freedoms⁴⁸⁵ to Incentives

A. Preliminary Observations

The issue of how the Canadian Bill of Rights and Canadian Charter of Rights and Freedoms apply to grant and tax administration is a complex one, worthy of several dissertations in its own right. What follows is a brief survey of some of the more important aspects of these two statutes relevant to the tax and grant initiatives examined in this paper.

Because the Canadian Charter of Rights and Freedoms has only been in effect since 1982 (in fact, one key provision did not come into force until April 17, 1985⁴⁸⁶) it is difficult to predict with any degree of certainty what effect if any it will have on grant and tax deduction situations. If judicial treatment of the Canadian Bill of Rights is any indication, expectations should be kept low. In this section of the paper, potentially relevant provisions of the Bill of Rights and the Charter are described and analyzed. Comparisons with the American experience are made where appropriate.

B. The Canadian Bill of Rights

At first glance, a number of provisions of the Bill of Rights could pertain to aspects of tax deduction or grant processes. However, the fixation of Canadian courts on their being a *right* at issue, and the application of the Bill of Rights to *individuals* remain major stumbling blocks. In *Dowhopluk v. Martin et al.*⁴⁸⁷ (1971) (discussed *supra*) the Ontario High Court ruled that since citizenship was a privilege and not a right, the Bill of Rights had no application to a Ministerial denial of citizenship. This

same type of reasoning applied to a financial assistance context would limit the usefulness of the Bill of Rights to grant and tax incentive administration. American courts have largely overcome the privilege/rights conundrum, and thus constitutional protections contained in the fifth and fourteenth amendments have been found to apply to "privilege" (i.e., benefit) situations.⁴⁸⁸ In Canada, however, as the Dowhopluk case demonstrates, the right/privilege distinction may be a continuing obstacle preventing Bill of Rights protections from extending to many incentive situations.

A second general point concerning the Bill of Rights is that its relevant terms refer to the the rights of "individuals", not corporations; thus, in *R. v. Colgate Palmolive Ltd.*⁴⁸⁹ (1971) the Ontario County Court held that a corporation is not an individual within the meaning of s. 1, and that a section of combines investigation legislation which specifically excluded the right of a corporation to trial by jury did not offend the provisions of s. 1 of the Bill of Rights.

Section 1 of the Bill of Rights reads (in part) as follows:

It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

- (a) *the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;*
- (b) *the right of the individual to equality before the law and the protection of the law; ... (emphasis added)*

The reference in s. 1(a) to a right of an individual to "enjoyment of property, and the right not to be deprived thereof except by due process of law" would at first blush appear to have direct

relevance to withholding or termination of grant or special tax status situations. If the privilege/right conundrum can be overcome here as in the United States, s. 1 (a) could be invoked to protect individuals from withdrawal or termination of benefits except by "due process of law". In the U.S., grants have been held to fit within the definition of fifth amendment property⁴⁹⁰ (the American fifth and fourteenth amendments prohibit deprivation of "property, without due process of law").

Section 1(b) of the Bill of Rights would appear to apply in those situations where two individuals apply for, but only one receives a benefit, and the two individuals are for all intents and purposes identical. Again, assuming the privilege/right distinction can be overcome (not to mention practical problems with proving the unequal treatment), this section would appear to be directly relevant to grant and tax initiatives. According to the Quebec Court of Appeal decision of International Association of Longshoremen, Local 1657 et al. v. The Queen in Right of Canada et al.⁴⁹¹ (1979), the difference in treatment must be based on prohibited forms of discrimination (e.g., race, national origin, colour, religion, or sex). Equal treatment cases are further discussed in the course of Charter analysis, *infra*.

Section 2 of the Bill of Rights provides (in part):

Every law of Canada shall, unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to ...

...(2) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

An initial obstacle to the application of s. 2 (e) in tax deduction or grant contexts is the fact that it only refers to fair hearings "for the determination of *his rights and obligations*." Unless "rights" is interpreted broadly enough to encompass "interests" in a benefit, then again it would appear as if the rights/privilege dichotomy will prevent useful application in benefit administration contexts. Thus, for example, in *Prata v. Minister of Manpower and Immigration*⁴⁹² (1976), the Supreme Court of Canada ruled that aliens have no right to remain here, so that therefore there was no determination of rights or obligations when a deportation order was decided upon and hence, s. 2 (e) did not apply. In the case of tax deductions and certain grants (eg. the Canadian Exploration Incentive Program), it may be easier to establish that applicants have a right to an incentive.

In short, the Canadian Bill of Rights, as applied by courts to date, would appear to have limited application to benefit administration situations. Two key problems which remain are the reference in s. 1 to "individuals" (which has been interpreted to exclude corporations) and the preoccupation with rights (both in the language of the statute and in the treatment of "privileges" by the courts). Thus, except in the case of non-discretionary "entitlements" to individuals such as tax incentives and CEIP, there is little likelihood that the Canadian Bill of Rights could be invoked in incentive situations.

C. The Canadian Charter of Rights and Freedoms

(1) General

In 1982, all relevant provisions of the Canadian Charter of Rights and Freedoms came into force, except for s. 15 -- the

"equal protection" provision -- which applies as of April 17, 1985. Two sections of the Charter could be directly relevant to grant and tax deduction contexts: section 7 (the right to life, liberty and security of the person), and section 15 (equality rights). These two provisions are examined below. Prior to this examination, however, a number of preliminary points should be made.

First, any challenges to legislation made pursuant to the Charter are constitutional challenges, and as such the Charter remains an avenue of last resort for lawyers. As Professor D. Mullan describes it...

...the Charter should only come into play where the common law is not capable of sustaining the applicant's claims and, while not all judges have followed that admonition, it is reflective of a general judicial disposition that constitutional issues should be avoided if a case can be decided on non-constitutional grounds.⁴⁹³ (footnotes omitted)

Second, it should be noted that, while section 7 expressly applies to "everyone", s. 15 refers to "every individual". According to available case⁴⁹⁴ and statute law,⁴⁹⁵ it would appear that "everyone" will be interpreted broadly so as to include corporations as well as natural persons. As for "every individual", the editors of The Canadian Charter of Rights -- The Prosecution and Defence of Criminal and Other Statutory Offences⁴⁹⁶ write:

In the early drafts during the 1980-82 drafting process, s. 15(1) opened with "Everyone" rather than "Every individual". The change to the present wording, which occurred as of the January 28, 1981 Revised Resolution placed before the Joint Committee of the Senate and House of Commons by the federal government, may result in s. 15(1) not being applicable to corporations although it will presumably be necessary to await until at least April 17, 1985 for that issue to be argued.⁴⁹⁷

The initial s. 15 decisions which have come out since April 17,

1985 have confirmed that a corporate entity is not an "individual", and accordingly, corporations lack status to bring an application under this section.⁴⁹⁸

A third preliminary point is the wide scope of the Charter; section 32(1) expressly states that the Charter applies to the "Parliament and government [emphasis added] of Canada in respect of all matters within the authority of Parliament", not just to laws or regulations. Hence, it would appear, for example, that government contracts are probably subject to the Charter, although...

...the fact that contracts are subject to the Charter should not jeopardize every lease granting differential terms to tenants in a government building, ... for the market and bargaining strength may reasonably explain these details. The focus of concern will be such actions as a refusal to deal with certain individuals, or unreasonable restraints on freedom of speech or association which an individual has no power to reject in negotiating a contract.⁴⁹⁹

...There will be little debate that the Charter should apply to the actions of departmental officials, in issuing regulations and granting or denying licences or grants authorized under statutes. The statutory discretion must be exercised in compliance with the Charter, while the regulations or statutes must be tested against it.⁵⁰⁰

On the basis of this analysis, then, it would seem apparent that government benefits -- regardless of whether they are characterized as "contracts", "grants" or "tax deductions" -- would by virtue of s. 32 be subject to the Charter.

(2) Application of Section 7

Section 7 of the Charter reads as follows:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.


Conspicuous by its absence is the phrase "...and enjoyment of

property...", which appears in both the Canadian Bill of Rights, and the American fifth and fourteenth amendments. Ironically, however, the term "security" may be interpreted sufficiently broadly to encompass security for a person's real and personal property.⁵⁰¹ Professor D. Mullan, in an optimistic passage, expounded upon the possibilities should courts choose to adopt an expansive definition of "security of the person":

The stuff of which the section is made would on this view be seen to embrace such things as various forms of public welfare as well as trade or occupational licences; not just security of the person in the sense of being free from actual physical confinement. Moreover, if "deprivation" in section 7 is read to embrace exclusion from various forms of benefits as a result of initial allocative decisions, the reach of the common law procedural fairness doctrine will have been expanded dramatically. At this point, the old concept of "privileges" is still employed by some courts to defeat the procedural claims of those seeking government largesse.⁵⁰² (footnotes omitted)

Perhaps not surprisingly, given Canada's rather conservative judicial tradition, decisions to date have interpreted s. 7 narrowly so as not to include any economic, commercial or property right.⁵⁰³

The meaning and content of "fundamental justice" is still not entirely clear. According to Lamer, J., of the Supreme Court of Canada in Reference Re s. 94 (2) of the Motor Vehicle Act (B.C.) (1985),⁵⁰⁴ "principles of fundamental justice" apparently has a substantive as well as a procedural component; moreover, it cannot be equated with the common law notion of "natural justice". At this point it cannot be said with certainty whether s. 7 "fundamental justice" provides any greater procedural protection than that afforded by natural justice or procedural fairness.



(3) Application of Section 15

Subsection 15 (1) of the Charter states that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Subsection 15 (2) provides that subsection 15(1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, or other enumerated grounds.

Although similar in tenor to s. 1(b) of the Bill of Rights, section 15(1) differs from its antecedent in a number of respects. First, s. 15 (1) refers to equality before "and under" the law. According to Professor W. Tarnopolsky (as he then was),⁵⁰⁵ this addition removed a possible gap in the scope of the provision, as implied by Mr. Justice Ritchie in *Attorney-General for Canada v. Lavell*⁵⁰⁶ (1974) and referred to by Mr. Justice Jockett in *Prata v. Minister of Manpower and Immigration*⁵⁰⁷ (1972). Apparently, the intended effect of the additional words "and under" the law is to extend application of the section to equality in administration, and not just before the courts. Second, the Charter s. 15 (1) contains the phrase "equal benefit of the law" in addition to the Bill of Rights s. 1 (b) "equal protection of the law" provision. Again, according to Tarnopolsky, the addition of the "benefit of" phrase closes the potential lacunae in coverage suggested by the judgement of Mr. Justice Ritchie in *Bliss v. Attorney-General of Canada*⁵⁰⁸ (1978) where Ritchie states:

There is a wide difference between legislation which treats one section of the population more harshly than all others .. and legislation providing additional benefits to one class of women ... The one case involves the imposition of a penalty on a racial group to which other citizens are not subjected; the other involves a definition of the qualifications required for entitlement to benefits.⁵⁰⁹

In *Ontario Public Service Employees Union et al. v. National Citizens Coalition Inc. et al.* (1987)⁵¹⁰, the Ontario Public Service Employees Union (OPSEU) alleged that tax laws permitting a taxpayer who earns a living by operating a business to deduct payments made to the National Citizens Coalition while not permitting a taxpayer with employment income to deduct contributions to organizations whose primary object is the advocacy of political or ideological views (eg., the OPSEU) violated equality rights under s. 15 of the Charter. Galligan, J., speaking for the Ontario High Court held that different treatment of taxpayers under taxing statutes did not constitute a denial of equal benefit under law pursuant to s. 15(1):

I have some difficulty in understanding how tax laws can be said to bestow benefits on taxpayers. But, having said that, it is clear that some taxpayers are entitled to certain deductions from their income while others are not. The Income Tax Acts are full of examples where one taxpayer for certain reasons has certain deductions which another taxpayer does not have....the fact that a taxpayer who earns his living by operating a business is entitled to a deduction which is not available to a taxpayer whose income is earned by way of wages or salary does not amount to that denial of equal benefit under the law which is contemplated by s.15 of the Charter.⁵¹¹

Note first that, similar to the *Sylvania* case discussed at the outset of Part Three, Galligan, J. had apparent conceptual difficulties with the notion of tax legislation conferring benefits, even while recognizing the deductions contained in the legislation. The second noteworthy aspect of the case for the purposes of discussion here is that it appears to stand for the

proposition that tax legislation which, in the final analysis provides remunerative advantages to certain types of taxpayers over other types, cannot be challenged under s. 15 of the Charter. It is unclear on the basis of Galligan, J.'s reasoning whether grant programs which operated in a similar manner to the tax legislation discussed here would be treated in the same manner by the courts.

Although the Ontario Public Service Employees Union case suggests that differential legislative conferral of benefit situations, at least in a tax context, may not attract s. 15 (1) protections, the breadth of the section and its application to benefits has been noted in somewhat humorous understatement by Tarnopolsky:

Unless one is to presume that Parliament suffered from verbal diarrhea, or lost control of their collective senses, or knew not what they were doing, surely the courts must presume that the addition of the clause "equality under the law", "Equal protection of the law" and "equal benefit of the law" must have been intended to cover all possible interactions between citizens and the law, not just for protection, but for benefit as well.⁵¹²

The expanded effect of s. 15(1) would appear to ensure that individuals applying for tax deductions or grants could rely on s. 15(1) in the event of discriminatory administration under government benefit programs; however, the practical problems of proving discriminatory administration would still remain.

Section 15(2) of the Charter essentially condones affirmative action programs. The preferential treatment of native Yukon prospectors over those from other regions in the Yukon Prospectors Assistance Program discussed earlier might fall within the protection of s. 15 (2).

n

(4) Summary Observations

In contrast to the somewhat disappointing and limited effect Bill of Rights on benefit administration, the Charter offers a number of promising avenues for the imaginative litigant. The scope of the Charter is expressly left open to "all matters within the authority of Parliament", not just to law or regulations. Section 7, if interpreted liberally, could extend to apply to the right of a person to enjoy a person's real and personal property, and the right not to be deprived thereof, except in accordance with the principles of "fundamental justice". The precise content of "fundamental justice" is still uncertain, as is its distinction from "natural justice" and "procedural fairness". Section 15 of the Charter could be applied in benefit situations to ensure that applicants are not discriminated against on the basis of enumerated grounds. By virtue of s. 15 (2) it would appear that affirmative action programs would probably not offend the equality provisions of s. 15 (1).

V. The Instrument Choice Question

The question of which instrument is preferable, grants or tax incentives, has been the subject of heated debate in Canada and the United States, with opponents adamantly swearing to the benefits of their choice, and the disadvantages of their counterparts. A leading American commentator has concluded that...

...as a generalization, the burden of proof should rest heavily on those proposing the use of the tax incentive method. In any particular situation...the first approach should be to explore the various direct expenditure alternatives.⁵¹³

At the same time, surveys of Canadian businesses reveal a strong preference for tax based incentives,⁵¹⁴ and a recent British Columbia Mineral Industry Task Force pronounced,

[t]he industry does not generally recommend grant systems as incentives for exploration in British Columbia...Instead the industry would prefer that exploration incentives be provided through the tax system...⁵¹⁵

A Canadian commentator summed up the situation as follows:

The mining exploration industry has almost always been adverse to cash grants. From the government's point of view, a grant system offers a number of advantages, including the ability to target specific expenditures, types of corporations, and geographical regions. However, the bureaucracy and government intervention which such systems invariably entail presents serious negatives from industry's perspective.⁵¹⁶

In order to properly examine this question it is necessary to look past the rhetoric and determine what are the real differences between the two mechanisms. An important point to keep in mind in the following discussion is the "is/ought" distinction: that is, the grants and tax incentives which have been described in this paper are not the only types of grants and tax incentives which could or should be available; thus, the deficiencies of the

current incentives should not blind the reader to the understanding that better designed incentives are often possible, and may answer criticisms directed at the current versions. The section is organized as a series of assertions about the value of each of the incentive types which are then critically analyzed.

(1) Tax incentives are preferable because there is already a well-developed administrative infrastructure set up for processing and distributing tax deductions whereas no comparable structure exists for grants.

It is true that there is a well-developed infrastructure associated with tax administration, but, for a variety of reasons, this structure is not ideally suited for the provision of certain incentives. First, use of the tax vehicle necessarily involves tax officials in the administration of what is in the final analysis an initiative which more properly belongs in the bailiwick of the various departments responsible for resource development. Thus, use of the tax vehicle necessitates a degree of inter-departmental coordination not necessary with direct expenditure programs: for each inter-departmental arrangement entered into, the likelihood of conflicts and confusion increases. In fact, at the federal level, the current move to decrease the attractiveness of the exploration incentives through the tax system is directly attributable to the more general efforts at tax reform: incentive schemes independent from the tax system would arguably be less likely to be affected by such reforms.⁵¹⁷

Second, the tax incentive administrative structure is designed primarily for the processing and distribution of nationwide or province wide initiatives. This may be appropriate

for some large-scale programs, but is less suited for more region- or corporation-specific incentives.⁵¹⁸ Further, although there may not initially be an administrative structure established for the provision of a grant program, there is no reason why such structure could not be set up. It stands to reason that an administration geared exclusively toward the processing and distribution of, for example, mineral and energy incentives, would be more sensitive to the needs of the community it serves (and more alert to abuses) than an administration responsible for collection and distribution of all tax provisions.

(2) Tax incentives are less intrusive than grants, and are preferable because they leave decision-making in the hands of the private sector, and thus involve less government bureaucracy.

The value of this assertion depends on the perspective of the person asserting it. From an industry standpoint, it is almost undoubtedly true that the less government involvement in decision-making the better. Because provision of tax incentives is structured to be as mechanical (and automatic) as possible, this gives industry a high degree of certainty in the planning of their affairs so that individuals can predict that if they meet certain conditions they will receive assistance.

However, grant programs could also be⁵¹⁹ (and arguably have been⁵²⁰) structured to a similar extent. The fact that grant programs frequently are considerably less automatic than tax incentives gives government greater control over how public funds are spent.⁵²¹ While this might not appeal to the private sector, it may very well be desirable for government, and for the general public.

The contention that tax incentives involve less government bureaucracy is a debatable one: federally, the Department of National Revenue is enormous, and this is not surprising given the impact taxation has on virtually every adult citizen of Canada. While the amount of government bureaucracy associated with flow-through share tax deductions is relatively small, the amount of private bureaucracy created by it is quite large: the "middlemen" between government tax officials and exploration companies include investors, brokers, lawyers and accountants.⁵²² With many of the direct grant programs, the necessity for use of this "private bureaucracy" is minimal. Federal government officials anticipate that the new Canadian Exploration Incentive Program will involve the same size federal bureaucracy as that associated with the Mining Exploration Depletion Allowance and flow-through share provisions under the Income Tax Act.⁵²³ It is probably reasonable to expect that the "private bureaucracy" associated with CEIP will remain about the same size as that currently operating in relation to MEDA and the tax flow-through share provisions.

(3) Tax incentives are only attractive to those individuals with income against which deductions can be offset (or the converse: grants are preferable policy instruments because the income position of applicants is not relevant to their effect).

The flow-through share tax provisions which allow non-producers (and producers with low income) to transfer their exploration deductions to those taxpayers with high income in need of a writeoff are an example of how income tax incentives can be used by low-income users. Another technique for making tax incentives attractive to low-income groups is use of the tax credit. Tax credits can be exchanged for cash, or used to offset

other tax payments. By the same token, a grant system can be designed so that qualifying persons have the option of converting their incentive into a tax credit: the Ontario Mineral Exploration Program is an example of this type of hybrid grant/tax incentive.

It may be suggested by some that, as an investment vehicle, tax incentives are favoured over grant systems. Although it is true that many investors seem to be attracted to tax writeoff initiatives such as the flow-through share provisions, grant programs can also be of interest to investors: thus, for example, Petroleum Incentive Program grants, which were offered by the federal and Alberta governments during the reign of the National Energy Program to encourage exploration, were known to have been sold by explorationists who qualified for the grants but were reluctant to wait through the processing period and so sold their entitlements to third parties in exchange for immediate cash.⁵²⁴ The recently announced CEIP is also intended to operate through use of flow-through share arrangements.

In short, tax incentives can be made attractive to low-income types, grants can be of interest to investors, and hybrid tax/tax credit/grant incentives are also possible.

(4) Grants are more visible and accountable instruments than tax incentives.

In the sense that the provision of grants requires at least an annual legislative appropriation of funds, it is true that grants are more visible and accountable instruments than tax incentives, where no appropriation is necessary and there is no ceiling set for expenditures. However, appropriations themselves

are typically not a highly visible act of the legislatures: as was described earlier, the provision of funds for the British Columbia Accelerated Mineral Exploration Program (AMEP) and Mining Exploration Incentive Program (MEIP) was contained in the schedule to a supply act, and did not even refer to the program by name. In fact, in the case of the AMEP and MEIP initiatives this was in effect the only legislative authority for the programs. Thus, while the visibility and accountability of grant initiatives is superior to that of tax incentives, in many cases it still leaves a lot to be desired. Moreover, there is no practical reason why tax expenditures could not be subject to a more rigorous visibility and accountability regime than is currently in place. Hence, neither existing grant nor tax incentives have particularly commendable accountability and visibility regimes.

It has been demonstrated how tax deduction initiatives such as the MEDA flow-through share provisions are government expenditures of public funds because they are public revenue foregone; however, in an act of self-delusion, the private sector might prefer to see tax incentives as something other than government assistance. Thus, for example, the British Columbia Mineral Industry Task Force recently proclaimed...

...[g]rants are conducive to waste and can be defined as government handouts. The use of CEE flow-through incentives are based on self-incurred productivity.⁵²⁵

On analysis, this proclamation can be characterized as nothing more than a series of misrepresentations as to the true nature of tax incentives and grants: both grants and tax incentives are government handouts, both are conducive to waste in the sense that both encourage the incurring of exploration expenses but for the most part do not purport to dictate where or how exploration

should take place, and both are based on self-incurred productivity (who else is incurring the productivity?).

Although the above-quoted statement of the B.C. Mineral Industry Task Force is fallacious, it highlights an important distinction between the two forms of assistance in the minds of many people: because of their less visible, "revenue-foregone" nature, tax incentives are less obviously government handouts, and are thus more palatable to the private sector and less objectionable to the public.⁵²⁶ This "psychological" or "political impact"⁵²⁷ factor should not be discounted when considering the advantages and disadvantages of the two forms of instruments.

Conclusions to Part Three: Legal Analysis

The point of departure for legal analysis of the grant and tax incentives discussed here was a tentative determination of the legal nature of the two instrument types. It was observed that tax systems are primarily vehicles for revenue collection and as such were coercive and penal in nature. As a consequence, tax legislation tends to be quite detailed, and is supported by a large administrative machinery (e.g., bulletins, circulars, tax courts, etc.), this presumably intended to ensure that tax collection and enforcement activities are only undertaken where necessary and to the extent necessary. Tax incentives appear to be grafted on top of this legislative and administrative machinery, and to some extent benefit from it, in the sense that the provision of tax incentives is a comparatively structured, automatic and visible process.

In contrast, and perhaps because of the fact that the provision of grant programs necessitates no unilateral act of force by the State, the grant initiatives examined here typically did not attract the heavy legal protections and structuring associated with tax regimes. The exact legal nature of grants is not altogether clear: they could be characterized as gifts, trusts, contracts or some other new type of legal instrument. The two most plausible characterizations would appear to be as contracts or as new instruments. Flowing from the characterization question are possible determinations of duties and obligations of administrators and grant applicant/recipients. Clearly, express judicial or statutory pronouncements on this subject would be helpful to government administrators, the private sector and the public.

The protections associated with the doctrines of natural justice and procedural fairness might apply to aspects of grant and tax administration. Those incentives described in legislation as being available as a matter of entitlement (e.g. tax deductions and the CEIP grant initiative) would appear more likely to attract judicial attention and protection because they more closely resemble a traditional "rights" (as opposed to "privilege") situation. Withdrawal of assistance, once it has been established, seems to be another area where courts have indicated a willingness to attach procedural protections.

Several provisions of the Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms could have application to incentives administration. In particular, the "equal protection and benefit" provision of the Charter (s. 15) may be available in cases of discriminatory administration of incentives, although it should be noted that court decisions to date have concluded that s. 15 applies only to protect individuals, not corporations. The Charter is only beginning to be explored by imaginative counsel. It remains to be seen just how powerful a tool it will be in incentive contexts.

From an instrument choice perspective, tax and grant incentives would appear to be largely interchangeable. Formulation of an incentive as a tax deduction allows government to make use of a pre-established legal-administrative structure, but this structure may have disadvantages (e.g., involvement of several departments). Because grant initiatives require at least annual legislative appropriations they are more visible than tax initiatives. Both tax and grant initiatives can be structured

so as to be available as entitlements. Both tax and grant initiatives can be used in conjunction with investment schemes. It would appear to be easier to design grant programs for the provision of discretionary and directed, low-volume region or client-specific incentive initiatives.

5

General Conclusions

In this paper, we have described the legal framework for the administration of several mining exploration incentives in Canada. It has been demonstrated that the legislative structures currently used to establish the programs, be they tax or grant types, have been variously insufficient. With respect to tax incentives, a major problem is the visibility and accountability of the programs, since an annual appropriation by the legislature is not required, and there is no limit on the amount of funds which can be disbursed, as is the case with grants. On the other hand, many mining exploration grant programs are established and operated on the slim legal foundation of an appropriation contained in a supply act. With the exception of the the recently announced Canadian Exploration Incentive Program, the grant initiatives examined in this paper operate in a discretionary manner, while tax deductions are more automatic (i.e., upon meeting certain conditions, the deduction was forthcoming).

Not surprisingly, the primary source of legal obligations and duties attached to administration of financial incentives is usually the legislation which establishes the incentives. With respect to tax incentives, there is a fairly detailed set of obligations in income tax legislation establishing procedures for the determination and awarding of deductions, supported by an elaborate administrative infrastructure using advance rulings, information bulletins and circulars, and an appeal hierarchy. On the other hand, with the exception of the CEIP and OMEP initiatives, grant legislation usually provides less detailed indication of the obligations and duties attaching to government officials in their administration. Frequently, the most important

source of information concerning grant operation is the agreement signed between government and the grant recipient. This in turn raises the question of how grants can be characterized in law, since certain obligations on officials and rights for grant applicants and recipients will flow from determination of the legal nature of a grant. Unfortunately, however, it is not clear at this point how courts might characterize grants. If they determine that grant agreements are contracts, to which the normal rules of contract apply, then only a minimum set of obligations would appear to attach to administrators. If grants can be considered a new legal instrument, not equatable to existing known forms (e.g., gifts, trusts, contracts) then the obligations attaching to operation would appear to depend upon the legislation which establishes them. Thus, for example, with CEIP incentives, the fact that language of entitlement purportedly will be used in the authorizing legislation will create obligations on administration not possible pursuant to more discretionary programs. Application of the doctrine of procedural fairness would appear to be dependent upon the language used in the legislation, regulations, and guidelines which establish the program.

Legal analysis reveals that the traditional treatment of government assistance as "government largesse", "privileges" as opposed to "rights" which therefore entail no obligations or responsibilities on the giver (government) and no notions of entitlement on the receiver, is giving way to a more realistic characterization as benefits which affect legal interests and generate legitimate expectations on the part of potential recipients and applicants. Flowing from this, courts are beginning

to attach procedural obligations to government assistance administration: in this respect, decisions where courts are finding duties on administrators to inform recipients of pending decisions to withdraw benefits and give them an opportunity to respond can be considered "the thin edge of the wedge".

As they currently operate, certain characteristics are associated with the grant and tax vehicles. Tax incentives tend to be highly structured types of assistance which leave little discretion in the hands of officials. This mode of operation is particularly well suited for high volume programs of general applicability. On the other hand, grant programs usually leave more discretion in the hands of officials, and may be directed at a specific region and type of individual. It should be noted, however, that tax incentives could be designed in such a way so as to leave more discretion in the hands of officials, and grants could be structured in such a way as to structure administrative discretion (CEIP is a case in point). Thus, grants and tax incentives need not exhibit the characteristics they now typically possess.

Even from such a cursory survey of incentive types as is provided here, it is apparent that both grant and tax incentive types are deserving of a great deal more study. This study could in turn lead to significant legal reform. High priority issues deserving of examination include: the need for a more visible and accountable tax expenditure process, permitting proper budgeting and awareness of revenue foregone as a result of use of incentives, the need for definitive characterization of grants, so that legal obligations attaching to administrators and legal remedies can be determined, more comprehensive grant legislation,

setting out procedures for unsatisfied parties, structuring discretion, etc. Some of these issues may eventually be answered by the courts as a result of challenges to tax or grant operations. It is submitted, however, that leaving these issues for courts to decide would be a less than ideal approach to reform, since it is likely to lead to ad hoc, piecemeal solutions in an area conducive to the more comprehensive attention associated with legislative reform.

With respect to the issue of legislative reform, a number of different approaches could be taken. One constructive technique would be to create a model incentive statute, which would include provisions authorizing the establishment of programs and annual scrutiny of its operations, the legal nature of incentives, obligations and responsibilities of administrators and incentive recipients, avenues of recourse available to unsatisfied incentive applicants and recipients, procedures and powers for enforcement and penalties for fraudulent activity. This model statute then could be used as a checklist by legislators considering the establishment of incentive programs. Another potentially fruitful approach would be the creation of a general incentives statute, which would apply to all existing and future programs. The advantage of this general legislation would be the consistency in legal and administrative treatment which presumably would ensue upon promulgation; on the other hand, the variability among incentive programs might bespeak the need for more individuated treatment than an overarching set of legislative provisions may permit. Short of these two rather sweeping reform measures, existing administrative procedure legislation could be amended so that it

more clearly addresses incentive operation, and financial administration legislation could improve the visibility and accountability of incentive appropriations.

In short, this study has revealed tremendous variations in mining exploration financial incentives across Canada, and equally tremendous variations in the legal treatment of incentives, be they tax or grant types. It has also described the uncertain position of courts in relation to treatment of incentives. Given the large sums of money involved in these programs, and their potential wide application, and evidence of misunderstanding as to the true nature of incentives, there is a great need for more thorough study of current programs, and comprehensive legal reforms.

Endnotes

1. For a slightly out-of-date catalogue of programs provided to the mining sector, see **Federal and Provincial Programs Applicable to the Mining Industry** (May, 1985), published by the federal Department of Energy, Mines and Resources.
2. For example, in New Brunswick, pursuant to the Canada-New Brunswick Mineral Development Agreement signed in June 1984, \$12.37 million was allocated for the period ending in 1989 to geoscience activities designed to provide new and more detailed information on those selected areas known or suspected to have a high potential for undiscovered deposits. Activities "will encompass metallic mineral deposit studies, regional geology, geochemistry, geophysics, surficial geology and till geochemistry, geoscience compilation, and drill core management": see **Canada-New Brunswick Mineral Development Agreement Annual Report 1985-1986**, p. 2. Most jurisdictions provide similar services. In addition, most jurisdictions offer annual geoscience seminars.
3. For example, the Ontario Ministry of Northern Affairs offers an "Industrial Infrastructure Program", which consists of interest-free forgivable loans up to a maximum of 50% of approved capital costs available to private sector projects to assist "in removing specific physical constraints to the development of identified small-scale private sector projects", including power and water supply, waste disposal, access and other public services: see **Nor-dev, Economic Development Assistance for Northern Ontario Business, Industry and Tourist Operators** (undated, but supplied to the author by Nor-dev in summer, 1987), at p. 10. In British Columbia, reduced cost electricity is available pursuant to the **Industrial Electricity Rate Discount Act**

S.B.C. 1985, c. 49, and assistance has been provided for the building of access roads (see s. 12 of the Ministry of Energy, Mines and Petroleum Resources Act, R.S.B.C. 1979, c. 270).

4. For example, flow-through share arrangements (discussed in greater detail infra) and Stock Savings Plans, such as those in operation in Quebec and Alberta.

5. For example, flow-through share initiatives, as discussed infra, and programs such as the British Columbia FAME (Financial Assistance for Mineral Exploration) the Ontario Mineral Exploration Program (OMEP) and the Quebec Mineral Exploration Financial Assistance Program (MEFAP): these programs are discussed in greater detail infra.

6. See, for example, the Canada-Nova Scotia Mineral Investment Stimulation Program, promulgated pursuant to the Canada-Nova Scotia Mineral Development Agreement, which provides financial assistance for mineral process studies to improve metallurgical recovery, product quality, reduce operating cost and investigate new techniques, among other things. A total of \$1.6 million has been initially allocated to MISIP over the period November 1985 to March 1989: information obtained from undated pamphlet, Mineral Investment Stimulation Program. A similar program operates in New Brunswick: information obtained from Canada-New Brunswick (jointly published) pamphlet Mineral Investment Stimulation Program (undated -- received Summer, 1987).

7. For example, Domtar Chemical Group (Sifto Salt division) recently completed a plant-modernization with federal financial assistance provided through the Atlantic Energy Conservation Investment Program.

8. For example, the joint federal, British Columbia, Alberta,

Saskatchewan, Manitoba and Northwest Territories Consultative Committee on Long Range Transport of Air Pollutants, first established in September, 1980: see Technical Committee for the Long-Range Transport of Atmospheric Pollutant in Western and Northern Canada, Annual Report, 1986, published April, 1987.

9. For example, the federal and Ontario governments are jointly providing financial assistance for abatement measures to the major sulphur dioxide pollution producers.

10. For example, the Alberta Energy and Natural Resources "Metallic and Industrial Minerals Inventory", the British Columbia Energy, Mines and Petroleum Resources Coal and Mineral Inventory File: see Federal and Provincial Programs..., op cit. at p. 10, "20.

11. For example, the Alberta Energy and Natural Resources "Coal Research and Technology Program" as described in Federal and Provincial Programs..., op cit., at p. 10.

12. For example, the Manitoba Department of Energy and Mines provides geoscience data, the New Brunswick Department of Natural Resources conducts geoscientific surveys and provides geoscience data files. Most jurisdictions provide comparable services: see Federal and Provincial Programs..., op cit. at pp. 10 - 60.

13. Among others, the provinces of British Columbia, New Brunswick, and Nova Scotia provide prospector training: see Federal and Provincial Programs..., op cit. at p. 19, 25 and 31.

14. Among others, the provinces of Alberta and Ontario offers programs of this type: see Federal and Provincial Programs..., op cit. at p. 11 and 34.

15. Among others, Alberta, British Columbia, and Ontario offer programs of this type: see Federal and Provincial Programs..., op cit. at p. 11, 19 and 34.

16. For example, M.K. McMullen, in "Canadian Federal-Provincial Mineral Development Agreements and the Role of Industrial Minerals", (paper presented at Annual Meeting of the Society of Mining Engineers, Inc. Denver, Colorado, February 23 - 27, 1987, Paper 87-69) notes at p. 2 that government geoscientific information programs led to private sector development of potash mines in New Brunswick, uranium and gold development in Saskatchewan and a gold mine in Newfoundland.

17. This definition of exploration is largely derived from the definition of Canadian exploration expense contained in s. 66.1 (6)(a) of the federal Income Tax Act, R.S.C. 1952, c. 148, as amended by S.C. 1970-71-72, c. 63, and subsequent amendments.

18. For example, Law Reform Commission of Canada, Report on Independent Administrative Agencies: A Framework for Decision-Making, Report to Parliament 26, 1985.

19. Defined at pp. 8 - 9, Law Reform Commission of Canada, *ibid.*, as "Having to answer for the exercise of what is essentially governmental authority to affect public and private interests. The rule of law demands that governmental authority not be exercised arbitrarily, and that agencies account, sometimes within a political framework, sometimes within a legal one, and often within both, for the decisions they make and for the policies they pursue as decision makers."

20. Defined at p. 9, Law Reform Commission of Canada, *op cit.*, as "Making decisions that are accorded full recognition. Where authority is ostensibly given to an agency to decide a matter, those who deal with agency are entitled to have the decision made by the agency, not by a politician, judge or other decision maker."

21. Defined at p. 9, Law Reform Commission of Canada, *op cit.*, as

"Making the administrative process as understandable as possible to those whom it affects. Interested persons must know whom to address, about what matters, and how to address them."

22. Defined at p. 9, Law Reform Commission of Canada, op cit., as "Getting the job done' without wasting human and material resources. Administration can be a drain on both public and private resources. It demands constant attentiveness to new and better ways of doing things."

23. Defined at p. 9, Law Reform Commission of Canada, op cit., as "According appropriate recognition to the interests that may be affected by agency decisions. Without fairness there will be neither the trust and credibility that lend integrity to a process, nor the co-operation that is essential if it is to be efficient."

24. Defined at p. 9, Law Reform Commission of Canada, op cit., as "Operating in a manner that is true to the objectives laid down for the agency; having a full commitment to its purposes. An agency must be sufficiently free of background pressure to project competence and confidence in carrying out its duties. The administrative process needs both the self-respect of the agencies and the respect of those with whom they deal."

25. Defined at p. 9, Law Reform Commission of Canada, op cit., as "Making the administrative process accessible to those it affects, and providing a window through which it can be seen. There must be openness if other values are to be adequately realized. For instance, those who are affected by decisions look to openness as a further guarantee of fairness and accountability."

26. Defined at p. 9, Law Reform Commission of Canada, op cit., as "Rationally correlating the information the agency has, the

interests of which it is aware, and the objectives, policies and criteria that are to guide its decisions."

27. Law Reform Commission of Canada, *op cit.*; at p. 9.

28. Comment by then-Ontario Minister of Natural Resources, Alan W. Pope, in unattributed article, "I think Ontario has achieved a reasonable balance", *The Northern Miner*, June 21, 1984, at p. B9.

29. *Ibid.*

30. The federal policy branch of Energy, Mines and Resources has concluded that taxation changes from 1971 to 1980 "contributed, to an extent; to the decline of the junior mining sector.": per Policy Branch, Energy, Mines and Resources Canada, *Mineral Policy: A Discussion Paper* (Ottawa: Supply and Services, 1982), at p. 58.

31. For example, placer gold mining, common in many of the streams and rivers of British Columbia and the Yukon.

32. One commentator reports that "the chance of being successful on a wildcat oil or gas well in conventional areas runs from between one for every eight wells to one for every twenty wells. In contrast, I have been advised that the chance of hitting a mine runs between about one for every two thousand holes drilled and one for every three thousand holes drilled." (Per Carr, in "Mine Development Funds" in R. Parsons [Chairman], *Canadian Mining Taxation Toronto: Insight*, 1982, at p. 37 of the "Mine Development Funds" section.

33. Carr, *ibid.*, writes that "[i]t is estimated that the current cost of finding a mineable ore body runs between \$35,000,000 and \$40,000,000." It should be noted that these types of figures are averaged and do not represent the actual costs on a per mine basis.

34. For general statement of the high risks associated with

mining, see Parson, *Canadian Mining Taxation: Tax Practice Series* Toronto: Price Waterhouse/Butterworths, 1982 at p. 3.

35. See, for example, R. Lucas, *Minetown, Milltown, Railtown: Life in Canadian Communities of Single Industry* (Toronto: University of Toronto Press, 1971); and J. H. Bradbury and I. St. Martin, "Winding down in a Quebec Mining Town: A Case Study of Schefferville", *Canadian Geographer* Vol. 27 Summer 1983, pp. 128 - 144.

36. For example, for certain Quebec grant programs, the size of the incentive awarded increases when the activity is carried on in an economically depressed region: see more detailed discussion *infra*.

37. For example, see Canada, Department of Finance, *Supplementary Information Relating to Tax Reform Measures*, December 16, 1987, (Tabled in the House of Commons by the Honourable Michael H. Wilson, Minister of Finance), at p. 76 where it states:

...the government recognizes the importance of sustained resource development activity to certain regions of the country and is concerned that adequate levels of activity be maintained during cycles of economic downturn in the industry. The Commons committee suggested that tax incentives or government subsidies may be necessary as temporary measures during periods of depressed prices or economic downturns to ensure the survival of exploration activities in Canada. The government concurs and would examine what temporary assistance might become necessary in such circumstances.

38. The *Income Tax Act*, R.S.C. 1952, c. 148, as amended by S.C. 1970-71-72, c. 63, and subsequent amendments. Hereinafter referred to as "the federal *Income Tax Act*" and "the *Income Tax Act*".

39. By "currently provided" the author means those programs available to the mining sector in 1987.

40. As discussed in more detail later in the text, the Quebec

Mining Exploration Financial Assistance Program expired March 31, 1987.

41. Program announced May 3, 1988: discussed in more detail infra.

42. Part I of the Constitution Act, 1982 [en. by Canada Act, 1982 (U.K.), c. 11 as Schedule B].

43. For example, the Quebec Taxation Act, R.S.Q. 1977, c. I-3, as amended.

44. For example, the New Brunswick Metallic Minerals Tax Act, R.S.N.B. 1973, c. 11.01, as amended.

45. For example, deductions for Canadian exploration and development expenses from income are permitted by s. 66(1), (2) and (3) of the federal Income Tax Act.

46. For example, Canadian exploration expenses, defined at s. 66.1(6)(a).

47. Canadian development expenses defined at s. 66.2(5)(a).

48. S. 18(1)(b) of the Income Tax Act and Part XI of the Income Tax Regulations, C.R.C. 1978, c. 945, as amended, hereinafter referred to as "the Income Tax Regulations".

49. S. 111(1)(a) of the Income Tax Act.

50. S. 20(1)(v.1) of the Income Tax Act and Part XII of the Income Tax Regulations.

51. S. 20(1)(gg) of the Income Tax Act.

52. S. 65 of the Income Tax Act and Part XII of the Income Tax Regulations.

53. Discussed in more detail infra.

54. Defined at s. 66.1(6)(a).

55. S. 66.1 and s. 66(3).

56. S. 66.1(6)(b).

57. S. 66.1 Note that by s. 66.1 (6)(b)(ix), any assistance or benefit that a taxpayer receives or is entitled to receive (e.g., a grant) is deducted from the CCE account. The grant-tax interface is discussed in greater detail *infra*.
58. S. 66.2(5)(a).
59. S.66.2(5)(b).
60. S. 66.2(2).
61. So described by the Honourable John N. Turner, then Minister of Finance, in the June 23, 1975 budget speech, as reported in R. Brown and R. Parsons, "The 25% resource allowance - a valuable incentive", CIM Bulletin, November 1980, pp. 180 - 182 at p. 180.
62. The resource allowance deduction is authorized by s. 20(i)(v.1) and s. 20 (15). Regulation 1210 describes operation of the resource allowance.
63. R. Brown, R. Parsons, *op cit.*, note 61, at p. 181.
64. Authorized by s. 65 (1).
65. Regulation 1203.
66. *Ibid*.
67. For definition of grass roots exploration, see s. 66.1 (6)(a)(iii).
68. R.S.Q. 1977, c. 1-3.
69. Defined at s. 395.
70. Ss. 398 - 399.
71. S. 360.
72. See generally, R. Parsons and P.G. Howes, "Exploration initiatives for Quebec investors", CIM Bulletin, June 1984, pp. 118 - 119.
73. Budget Speech, 1986.
74. R.S.B.C. 1979, c. 263.

75. See generally s. 5 of the Mineral Resources Tax Act, *ibid.*
76. S.5(2)(c)1.
77. S. 5(2)(d).
78. See Parsons, "Alternatives to flow-through", *CIM Bulletin*, February 1988, pp. 80 - 83, at p. 80.
79. R.S.N.B. 1973, c. M-11.01, as amended.
80. S. 2.1(6)(k.1). According to Parsons, in "Alternatives...", *op cit.*, at p. 80, the after-tax cost of exploration to a taxable producer is eight cents on the dollar.
81. *Canadian Tax Journal*, Sept.-Oct. 1987, pp. 1161 - 1198.
82. *Ibid.*, at p. 1161.
83. S. 66(15)(a.1).
84. See, for example, *Victory Hotels v. M.N.R.* [1962] D.T.C. 1378 at p. 1386 (Exch. Ct.) and Roy, *op cit.*, note 81, at p. 1162 and pp. 1183 - 1184.
85. *Ibid.*
86. *Quebec Taxation Act*, *op cit.*, note 68, at p. 399.
87. See, for example, R. Parsons, "Recommended reading: IGWG report on mining taxation", *CIM Bulletin*, Nov. 1986, pp. 60 - 62.
88. *Ibid.*, at p. 60 where Parsons states:

At issue here is the harmonization of the provincial/territorial income and mining tax rules, and the possibility of bringing these rules more into line with federal rules. The mining tax legislation in each of the provincial and territorial jurisdictions is unique. For many years the industry has called for a uniform set of rules which would apply in each jurisdiction.... The provinces and territories cannot see the adoption of a uniform set of rules as a practical matter. Each province has its own policy objectives. As long as the mining tax legislation is used not only to raise revenue but also as a device for implementing provincial policies with respect to the industry, uniformity of provincial mining tax rules is unlikely.

89. Subsection 66 (12.6) of the Income Tax Act, as added by S.C. 1986, c. 55, s. 11(4). Note that the form of flow-through shares changed significantly as a result of the 1986 amendments, and that the definition provided by the 1986 amendments does not accurately describe the form of flow-through shares in previous and subsequent years: this point is elaborated upon *infra*.

90. B. Kalymon, *Flow-through Share Financing*, Centre for Resource Studies, Queen's Univ., Kingston, 1987, at p. 1.

91. For discussion of specific provisions pursuant to which mining flow-through share financing is made possible, see *infra*, at pp. 27 - 33.

92. See, for example, discussion of Echo Bay Mines flow-through share offering in R. Raich, "Flow-through Share Financing -- Present and Future", paper presented at the Canadian Tax Foundation Annual Convention, Montreal, November, 1987, at pp. 4 - 5.

93. Unless the investor was a trader or dealer in securities and had acquired the shares as an adventure in the nature of trade, proceeds realized on the disposition of the sales will be taxable as a capital gain rather than ordinary income: paraphrased from B. Dent and J. Jakolev, "Flow-through Shares in the Mining Industry", Sept.- Oct. 1985, *Canadian Tax Journal* 1014 - 1027 at p. 1015.

94. Dent and Jakolev, *ibid.*, at p. 1019; see also Carten, in "Flow-Through Share Financing", in *Income Tax Considerations in Corporate Financing*, 1986 Canadian Tax Foundation Corporate Management Tax Conference, at p. 388 states:

It is evident that, even with a capital gains tax on disposition, the investor will pay a premium over market value to acquire shares on a flow-through basis. For example, after taking into account the deductibility of

Canadian exploration expenses and the capital gains tax on disposition of the shares, an Alberta investor who is taxable at a marginal rate of 52.7 per cent can afford to pay a premium of slightly more than 50 per cent of the market value of shares of the issuing corporation to realize the same after-tax return of his investment as the would realize if he acquired the same shares in the market. If one were to ignore the cost of the capital gains tax, the investor could pay more than double the market value of the shares and nevertheless break even on his investment.

95. For discussion of this type of situation, see R. Raich, *op cit.*, note 92, at pp. 4 - 5.
96. Final determination of whether expenses qualify is made by tax government officials: see discussion of administration and enforcement *infra* at pp. 33 - 36.
97. For more detailed discussion of the liability issue, see Carten, *op cit.*, note 94, at pp. 392 - 393.
98. Discussed in greater detail *infra* at pp. 27 - 33. See also Raich, *op cit.*, note 92, at pp. 9 - 15.
99. See comment to this effect in Carten, *op cit.*, note 94, at p. 409.
100. Discussed in greater detail *infra*.
101. S. Surrey and P. McDaniel, in *Tax Expenditures* (Harvard Univ. Press, 1985), comment regarding tax investment vehicles in the United States as follows:

The tax shelters that have dominated the tax scene for a decade or more are by-products of tax expenditure provisions. Most of these provisions initially had a narrow focus -- to assist an oil developer ... or farmer ... to help a manufacturer obtain machinery ... to promote construction of rental housing But investment professionals soon learned to package these tax benefits and to syndicate them in partnership form so that they benefited any reasonably well-off person who had money ... to invest and who desired immediate deductions to reduce the direct tax on income from professional or other sources unrelated to the activity. These unforeseen spin-offs became so widespread that the the continuance of the tax shelters, rather than the intial intent, came to be seen as the rationale for many tax expenditures. Dissipation of much of the assistance

over a wide range of middlemen -- investors, brokers, lawyers, and accountants -- resulted in larger revenue losses from the tax expenditure. (p. 105)

Although the mining exploration deductions seem to have had a major impact on mining exploration in Canada (as discussed *infra*), the development of the flow-through share structure as a tax shelter vehicle could come in time to resemble Surrey and McDaniel's observation with respect to American tax shelters.

102. Carten, *op cit.*, note 94, at p. 389. The following discussion is based on a more detailed description contained in Carten and Dent and Jakolev *op cit.*, note 93.

103. Section 83A was enacted by S.C. 1955, c. 54, section 22. See particularly ss. 83A (7) and (8).

104. Dent and Jakolev, *op cit.*, note 93, at p. 1015.

105. [1966] CTC 283 (Exch. Ct.), affirmed [1967] CTC 396 (SCC).

106. See S.C. 1974-75-76, c. 26, s. 36 (1), amending s. 66.1 (6) (a).

107. 20% per annum on a declining balance basis.

108. S.C. 1976-77, c. 4, ss. 24 (2): see Dent and Jakolev, *op cit.*, note 93, at p. 1015.

109. S.C. 1976-77, c. 4, ss. 24 (1).

110. Added by S.C. 1976-77, c. 4, s. 26 (1).

111. As amended by S.C. 1980-1981-82-83, c.140, s. 36 (1).

112. See, e.g., R.N. Sheinin, "Resource Tax Shelters -- An Alternative", in *Report of Proceedings of the 28th Tax Conference, 1976 Conference Report* (Toronto: Canadian Tax Foundation, 1977) pp. 194 - 205, at p. 203.

113. Carten, *op cit.*, note 94, at p. 397.

114. Carten, *op cit.*, note 94, at p. 392 elaborates on this point:

To circumvent the operational problems, the issuing corporation typically purported to carry on the

exploration and development program as agent for the investors, although in truth many of the incidents of an agency relationship were not present in the agreements normally entered into. Of course, one of the incidents of agency is the liability of the principal for the acts, including in particular tortious acts, of his agent. Thus, investors nominally responsible for conducting exploration programs were theoretically responsible for not only the direct costs of the program, but also unanticipated third-party costs.

115. Regulation 1203 (passed February 14, 1985 but applicable to taxation years ending after April 19, 1983). More detail about the mining exploration depletion is provided *infra*.

116. Canada, Department of Finance, Budget Papers, Supplementary Information and Notices of Ways and Means Motions on the Budget, April 19, 1983.

117. For further discussion of the impact of flow-through shares, see *infra*, at pp. 37 - 39.

118. Section 110.6, as added by S.C. 1986, c. 6, s. 58 (1).

119. For more detailed discussion of the applicability of this exemption to flow-through share issues, see Dent and Jakolev, *op cit.*, note 93, at p. 1017.

120. Amendment pursuant to S.C. 1985, C. 45, s. 29 (8): the phrase "a mineral resource", contained in the definition of Canadian exploration expense (ss. 66.1 (6) (a)(iii.1)) was changed to "a new mine" in respect of a mineral resource. The effect of this change was to include in the definition of CEE expenses associated with bringing a new mine into production since May 9, 1985, even though there had previously been production from another mine in that same mineral resource property: paraphrased from Carten, *op cit.*, note 94, at pp. 386-387.

121. Subsection 66 (12.66), as added by S.C. 1986, c. 55, s. 11 (4), and applying to expenses incurred after February, 1986. This provision acknowledged the reality that much exploration activity

takes place in the winter. The provision permitted the exploration expenses for the complete winter exploration season to be included in a single tax year.

122. Subsection 66 (12.6) of the Income Tax Act, as added by S.C. 1986, c. 53, s. 11 (4). Under the old rules (discussed in greater detail *infra*), in order for their to be an approved flow-through arrangement it was necessary to structure relations so that a principal-agent relationship existed between the investor/shareholder and the corporation carrying out the exploration. This exposed the investor to third party liability: see Raich, *op cit.*, note 92, at pp. 3 - 4, and Carten, *op cit.*, note 94, at pp. 392 - 394.

123. Subsection 66 (15)(d.1), as added by S.C. 1986, c. 55, s. 11 (7). One commentator has suggested that the principal business corporation is unnecessary, and that the diligence required in determining whether or not a corporation qualifies as a principal business corporation will work against junior issues in favour of more established companies: see Carten, *op cit.*, note 94, at p. 409, and see discussion *infra*.

124. For detailed discussion of some of the variations, see Kalyon, *op cit.*, note 90, esp. pp. 20 - 24.

125. Per Carten, *op cit.*, note 94, at p. 403.

126. The requirement that flow-through shares be issued by a principal business corporation is included in the definition of flow-through shares, at s. 66 (15)(d.1), which was added by S.C. 1986, c. 55, s. 11 (7). Note that this definition of flow-through shares only applies to agreements reached after February, 1986. The definition of principal business corporation is located at s.

66 (15) (h).

127. Pursuant to s. 66 (15) (d.1) flow-through shares can also be issued with respect to Canadian development expenses and Canadian oil and gas property expenses, but because the focus of this paper is on the exploration phase, no further reference to these other eligible expenses will be made here. It should be noted, however, that, the high deductions available for CEE and Mining exploration depletion allowance (discussed *infra*), when compared with those available for CDE and COGPE mean that the main attractiveness of flow-through shares is with respect to mining exploration.

128. See in particular s. 66 (15) (d.1) and s. 66 (12.6).

129. Per Raich, *op cit.*, note 92, at pp. 3 - 4.

130. Per Carten, *op cit.*, note 94, at p. 409.

131. Raich describes one issue where the value of the shares dropped substantially over the two week period from close of issue to disposition, *op cit.*, note 92, at pp. 4 - 5.

132. *Ibid.*

133. For example, as described by Carten, *op cit.*, note 94, at p. 401.

134. This is an indirect deduction: as Carten, *op cit.*, note 94, at p. 401 states, "the costs of issuing partnership units are deductible in computing the income or loss of the partnership and therefore effectively deductible by the investors."

135. Per Raich, *op cit.*, note 92, at pp. 5 - 6.

136. *Ibid.*, at pp. 6 - 7. A prescribed share can be defined as a share issuance other than a common share in which a pre-arranged and explicit agreement is made whereby the issuer guarantees the buyer a buy-back price.

137. See the definition of flow-through shares: subsection 66

(15)(d.1).

138. See Kalymon, *op cit.*, note 90, at pp. 21 - 24 for discussion of variations; see also, Raich, *op cit.*, note 92, at pp. 7 - 8.

139. Paraphrased from Raich, *ibid.*

140. The meaning of "Canadian exploration expense" is fairly exhaustively set out in the Income Tax Act, and although technical is not difficult to understand.

141. According to s. 66 (15) (d.1) (added by S.C. 1986, c. 55, s. 11 (7) of the Act), flow-through shares cannot be "prescribed shares". In essence, "prescribed shares" are defined at s. 6202 of the Income Tax Regulations as any share in which the shareholder's risk of loss is reduced by the share issuer in a five year period from the time of issue.

142. Described in Raich, *op cit.*, note 92, at p. 11.

143. *Ibid.*, at p. 9.

144. *Ibid.*, at p. 13. Note, however, that according to Interpretation Bulletin IT-479R, paragraph 18, the practice of short selling will usually result in the disposition being treated as income rather than capital.

145. Proposed regulation s. 6202.1: as of May, 1988, this regulation had still not been tabled.

146. S. 150 (1): for individuals, a return must be filed for each year that tax is payable; for corporations (other than a registered charity), a return must be filed annually regardless of whether or not tax is payable.

147. "Minister" is defined as the Minister of National Revenue by s. 218 (1) of the Act. Pursuant to s. 4 and the schedule of the Department of National Revenue Act, R.S.C. 1970, c. N - 15, the Minister of National Revenue has "the control, regulation,

management and supervision" of, among other things, "[i]nternal taxes, unless otherwise provided, including income tax." By section 220 (1) of the Income Tax Act, the Minister shall administer and enforce the Act and control and supervise all persons employed to carry out or enforce this Act and the Deputy Minister of National Revenue for Taxation may exercise all the powers and perform the duties of the Minister under the Act.

148. Per *Jolicoeur v. M.N.R.* 60 D.T.C. 1254, [1960] C.T.G. 346 (Exch. Ct.) and *M.N.R. v. Appleby*, 64 D.T.C. 5199, [1964] C.T.C. 323 (Exch. Ct.).

149. S. 152 (1).

150. S. 150 (1).

151. S. 235.

152. S. 163 (1).

153. S. 163 (2).

154. S. 239 (1).

155. S. 239 (2).

156. Information Circular 73-10R2, "Tax evasion and avoidance," April 24, 1978, para. 8.

157. See generally, *ibid.*

158. *Ibid*, para. 50.

159. *I.R.C. v. Duke of Westminster* [1936] A.C. 1.

160. Dymond, Reid, and Curran, *Income Tax Administration, Avoidance and Evasion* Toronto: Butterworth, 1981 at p. 147.

161. See generally, Dymond, Reid and Curran, *ibid.*, at pp. 72-83.

162. Subs. 230 (1), Regs. 1800.1-1801.

163. Ss. 231 - 232.

164. S. 231 (7).

165. Kalymon, *op cit.*, note 90, at p. 2.

166. According to Mr. John Fennelly, Acting Supervisor, Tax Incentive Audit Directorate, Revenue Canada, in a telephone conversation March 17, 1988 with the author, the tax audit personnel have just begun audits with respect to flow-through share arrangements, and thus it is premature at this stage to speak of detected incidents of abuse.

167. Per Dr. K. Brewer, Director General, Economic and Financial Policy Branch, Energy, Mines and Resources Canada, in telephone conversation with author, May 10, 1988.

168. The foregoing is paraphrased from Dymond, Reid and Curran, *op cit.*, note 160, at pp. 59 - 60.

169. See *Stickel v. M.N.R.* 72 D.T.C. 6178, at 6185, reversed on other grounds 73 D.T.C. 5178, affirmed 74 D.T.C. 6268 (S.C.C.).

170. Paraphrased from Dymont, Reid, Curran, *op cit.*, at pp. 60 - 63.

171. See generally, L. Dollinger, *Income Tax Appeals: Law and Practice* Toronto: Butterworths, 1981; see also R. Appleby and A. Greenspoon, "The Tax Court of Canada and the Tax Appeal Process" (1984) 5 *Advocates' Quarterly* 331 - 347.

172. Federal-Provincial Fiscal Arrangements and Established Programs Financing Act, 1977 S.C. 1976 - 77, c. 10

173. See, for example, "Figure 1. Metal Mine Financial Statistics, Income Statement Accounts" in Kalymon, *op cit.*, note 90, at p. 6.

174. *Ibid.*

175. *Ibid.*

176. Comment to this effect in Kalymon, *ibid.*, at p. 5.

177. *Ibid.*

178. PDAC Digest, "Results of latest PDA flow-through share

survey", Winter 1985-86, at p. 4.

179. Raich, *op cit.*, note 92, at p. 1.

180. Kalymon, *op cit.*, note 90, at p. 17.

181. John Larche, President of the Prospectors and Developers Association of Canada, stated in the March 7, 1988 issue of the PDAC Digest that, for the years 1987 and 1988 (to that point), there were 34 new mines either in production or committed to production by year end, an average of 17 per year. "Compare this with the average rate of new mines prior to 1983 which had been approximately three per year for many decades." per "Message from the PDAC President, John Larche," PDAC Digest, March 7, 1988 at p. 1.

182. *Ibid.* See also comments to this effect by Jean-Paul Lacasse of the Quebec Association of Prospectors in "Flow-through Survivors: Will government change its mind?" PDAC Digest, March 8, 1988, at p. 1.

183. See, Government of Canada, Department of Finance, Supplementary Information Relating to Tax Reform Measures, December 16, 1987, Tabled in the House of Commons by the Honourable Michael H. Wilson, Minister of Finance, at p. 1.

184. *Ibid.*

185. *Ibid.*

186. According to the December 17, 1987 modifications to the White Paper as contained in Government of Canada, Supplementary Information ..., *ibid.* If the 60-day carry-back feature is used, this means that expenses incurred up to February 28 and renounced (under a flow-through share arrangement effective December 31, 1989) would be eligible for funding at the 116 1/3% rate.

187. Department of Finance, "Six-Month Extension of Mining

Exploration Depletion Allowance for Individuals" News Release, Ottawa, May 3, 1988, 88-53. Through use of the sixty day carry-back rule, "grass roots" mining exploration expenses incurred by individuals in January and February 1989 under the 60-day rule and renounced under a flow-through arrangement effective December 31, 1988 will also qualify for the 33 1/3% deduction.

188. *Ibid.*, at p. 7.

189. Raich, *op cit.*, note 92, at pp 15 - 16.

190. Government of Canada, Department of Finance, **Supplementary Information** (December 17, 1987), *op cit.*, note 183, at p. 24.

191. *Ibid.*

192. Raich, *op cit.*, note 92, at p. 18.

193. As discussed *supra*, at p. 32.

194. Government of Canada, Department of Finance, **Supplementary Information**..., *op cit.*, note 183, at p. 76.

195. *Per Final Report and Recommendations of the Advisory Committee on Junior Resource Financing and the Competitive Position of Ontario* (hereinafter referred to as "the Thompson Report"), Government of Ontario, Ministry of Northern Development and Mines, July, 1986, Vol. Two, p. 99.

196. See, variously, K. Rachamalla, "Incentives Available to Producers and non-Producers in Ontario", paper presented at 85th Annual Meeting of the Canadian Institute of Mining and Metallurgy, April 19, 1983; K. Rachamalla, "Mineral Tax Incentives in Ontario", February 16, 1982, paper presented at the 111th Annual Meeting of the Society of Mining Engineers of AIME; K. Rachamalla, "Government Assistance Under the Mineral Exploration Program" (October 30, 1981, Rocks to Riches Seminar); Ontario Ministry of Natural Resources, **The Ontario Mineral Exploration Program**

(undated pamphlet); and the Thompson Report, Vol. II, *ibid.*

197. The Ontario Mineral Exploration Program Act, R.S.O 1980, c. 20, as amended, and regulations. Hereinafter referred to as "The OMEP Act".

198. Per Ontario Ministry of Natural Resources, Ontario Mineral Exploration Program (undated pamphlet), p. 3.

199. Per OMEP Act, s. 3, and references cited in footnote 196, *supra.*

200. OMEP Act, s. 3 (1).

201. By s. 2 (5) the Minister can designate a maximum grant limit applicable to the program for the year. According to the latest available administrative guidelines (April 1, 1987), the aggregate amount of grants or tax credits receivable by an OMEP applicant is \$500,000.

202. Per s. 3(1) and s. 3(3).

203. S. 3 (1).

204. S. 3 (2).

205. S. 4 (2).

206. S. 3 (2).

207. Rachamalla, "Mineral Tax Incentives in Ontario", *op cit.*, note 196, at p. 6; Rachamalla, "Financial Incentives to Producers ...", *op cit.*, note 196, at p. 2. Confirmed by Mr. Ed Solonyka, OMEP administrator, in telephone conversation, March 30, 1988.

208. Per Ontario Mineral Exploration Program Administrative Guidelines, April 1, 1987.

209. Directly extracted from press release accompanying the April 1, 1987 OMEP Administrative Guidelines.

210. Telephone conversation with Mr. Ed Solonyka, OMEP Administrator, March 30, 1988. According to Mr. Solonyka, OMEP was

allocated \$8 million in funds in 1987, down from \$12 million in 1986.

211. OMEP Act, s. 3 and 4.

212. OMEP Act, s. 1(1)(c) and s. 2 (1).

213. OMEP Act, s. 13 and Ontario Regulation 719/80.

214. OMEP Act, s. 1(1)(i), and Ontario Regulation 719/80, s. 2.

215. Ontario Regulation 719/80, s.1.

216. Statement to this effect in Rachamalla, "Government Assistance under the Ontario Mineral Exploration Program", op cit., note 196, at p. 1.

217. S. 66.1(b)(ix), added by S.C. 1980-81-82-83, c. 48, s. 34 (13).

218. Per Mr. Ed Solonyka, OMEP administrator, as related in a telephone conversation of March 30, 1988.

219. Lytton Minerals Ltd. v. Ministry of Northern Development and Mines, Ontario S.C.T.D., Toronto, January 29, 1988, Court File # RE 2093/87, Boland, J. presiding.

220. Ibid., at p. 5 of judgment.

221. OMEP Administrative Guidelines, April, 1987.

222. Ibid.

223. OMEP Act, s. 9(1), s. 9(3).

224. OMEP Act, s. 9(2).

225. OMEP Act, s. 7(3).

226. OMEP Act, s. 7(5).

227. Telephone conversation with Mr. Ed Solonyka, OMEP administrator, March 30, 1988.

228. OMEP Act, s. 7(6).

229. OMEP Act, s. 8.

230. Telephone conversation with Mr. E. Solonyka, op cit.. The

case, involving Lytton Minerals is discussed *supra*.

231. OMEP Act, s. 11(1)(c).

232. OMEP Act, s. 11(1)(a).

233. OMEP Act, s. 11(1)(d).

234. Telephone conversation with E. Solonyka, *op cit.*

235. OMEP Act, s. 10(1).

236. OMEP Act, s. 10(2).

237. Telephone conversation with E. Solonyka, *op cit.*

238. Thompson Report, Vol. II, *op cit.*, note 195, at p. 73.

239. *Ibid.*, at p. 95.

240. *Ibid.*

241. *Ibid.*, at p. 98.

242. *Ibid.*, at p. 96 - 97.

243. Mines and Minerals Division, Ministry of Northern Development, Press Release and Administrative Guidelines, April, 1987.

244. The following information concerning British Columbia exploration programs is principally derived from the British Columbia Ministry of Energy, Mines and Petroleum Resources publication FAME Financial Assistance for Mineral Exploration, Queen's Printer for British Columbia: Victoria, B.C., 1987 (hereinafter referred to as "FAME").

245. *Ibid.*, at p. 2.

246. Telephone conversation with Dr. Vic Preto, Manager, District Geology and Coal Resources, B.C. Ministry of E.M.P.R., April 8, 1988; and Mr. Brian Grant, Director, FAME Program, April 5, 1988.

According to these officials, prospector aid has been provided consistently since the 1940's. A more broad based mineral exploration program similar to AMEP and MEIP was provided briefly

in the late 1970's. See also the Mineral Prospectors Act, S.B.C. 1974, c. 68, now R.S.B.C. 1979, c. 262, (as amended) and G. Tickner, "Evaluation of Ministry of Energy, Mines, and Petroleum Resources Exploration Incentive Programs", December, 1982, Mineral Resources Division, Victoria, B.C..

247. Per FAME, op cit., at p. 3.

248. Ibid.

249. Ibid.

250. Ibid.

251. Ibid.

252. Ibid., at p. 4.

253. Ibid.

254. Mineral Prospectors Act, op cit., note 246, s. 5(2). No penalties are set out in the Act for breach of the offence.

255. Ibid., s. 3 (2).

256. Per FAME, op cit., note 244, at p. 4.

257. Telephone conversation with Mr. Brian Grant, op cit.

258. Per FAME, op cit., note 244, at p. 2.

259. Ibid., at p. 7.

260. Ibid.

261. Ibid.

262. Ibid.

263. Ibid.

264. Telephone conversation with Mr. Brian Grant, op cit.

265. Per FAME, op cit., note 244, at p. 7.

266. Ibid., at pp. 7 - 8.

267. Ibid., at p. 8.

268. Ibid.

269. Ibid.

270. The FAME Management Committee consists of senior Ministry of Energy, Mines and Petroleum Resources.

271. Per FAME, op cit., note 244, at p. 8.

272. Ibid.

273. Ibid., at p. 9.

274. Ibid., at p. 2.

275. Ibid., at p. 9.

276. Ibid.

277. Ibid.

278. Insofar as an administrative publication can obligate the Ministry. See infra for further discussion of the limited legal basis for the program.

279. Per FAME, op cit., note 244, at p. 9.

280. Ibid., at pp. 9 - 10.

281. Ibid., at p. 10.

282. Ibid.

283. Ibid., at p. 11.

284. Ibid. Again, the FAME administrative document must be taken as authoritative simply by default, because there are no statutory or regulatory obligations specifically applying to FAME administration.

285. R.S.B.C. 1979, c. 270, as amended.

286. Sections 4 and 5 of the Ministry of Energy, Mines and Petroleum Resources Act, ibid., authorize EMPR to administer Acts and regulations assigned to the Minister. The Mineral Prospectors Act, R.S.B.C. 1979, c. 262 is one of the Acts assigned to the Minister.

287. The Ministry of Energy, Mines and Petroleum Resources Act, op cit., note 285, s. 1.

288. Ibid., s. 5 (e).

289. Ibid., s. 12.

290. For example, the combined effects of ss. 1 and 2 and the schedule to the Supply Act (No. 2), 1986 S.B.C. 1986, c. 22, authorizes the disbursement of \$35,259,586 from the Consolidated revenue fund to the Ministry of Energy, Mines and Petroleum Resources for the fiscal year ending March 31, 1987.

291. Information concerning FAME impact derived from following sources: Report to the Government of British Columbia by the Mineral Industry Task Force, February, 1987, at p. 71; "Grants, geochemical surveys assist B.C. prospectors", The Northern Miner, July 7, 1986; "Province doubles prospector grants", The Northern Miner, May 11, 1987 and telephone conversations with Mr. Brian Grant, FAME administrator, and Dr. Vic Preto, Director of Prospector's Assistance, April 4 and 8, 1988.

292. Ibid.

293. "Province doubles prospector grants", op cit., note 291.

294. Ibid.

295. Telephone conversation with Mr. Brian Grant, op cit.

296. Ibid.

297. Telephone conversation with Mr. Brian Grant, op cit.

298. See, for example, comment to this effect in Report to The Government of British Columbia by the Mineral Industry Task Force, op cit., note 291, at p. 68.

299. In a letter to the author from Mr. Claude Hébert, Quebec Ministry of Energy and Resources official responsible for promotion and aid for mining exploration dated August 3, 1987, Mr. Hébert relates how the MEFAP was put into place in 1985, but expired March 31, 1987.

300. Information concerning program derived from pamphlet entitled Norms for the Quebec Program of Financial Assistance to Mining Exploration and is undated. It is published by the Quebec Ministry of Energy and Resources. It was supplied to the author in June, 1987.

301. Information concerning GPP derived from Quebec Ministry of Energy and Resources brochure entitled Programme d'assistance financière a la prospection du Bas-Saint-Laurent et de la Gaspésie, November, 1986.

302. The following information is derived from the pamphlet Norms for the Quebec Program of Financial Assistance to Mining Exploration, op cit., note 300, unless otherwise footnoted.

303. Information obtained from Quebec Ministry of Energy and Resources, Industrie Minérale du Quebec, (1986), at p. 16.

304. Ibid.

305. The following information derived from Programme d'assistance financière a la prospection du Bas-Saint-Laurent et de la Gaspésie, op cit., note 301.

306. Ibid., at p. 10.

307. Ibid., at pp. 1 - 2, and p. 11.

308. Ibid., at pp. 2 - 3, and p. 11.

309. Ibid., at pp. 3 - 4, and p. 11.

310. Ibid., at p. 4 and p. 11.

311. Ibid., at p. 11.

312. Ibid.

313. Ibid., at pp. 6 - 8.

314. Ibid., at p. 5.

315. Ibid.

316. Ibid.

317. Ibid.

318. Ibid.

319. Ibid., at p. 6.

320. Ibid., at p. /1.

321. Ibid., at p. 11.

322. With respect to MEFAP, see Norms for the Quebec Program of Financial Assistance to Mining Exploration, op cit., note 300. With respect to GPP, description and terms of the program are contained in Programme d'assistance financière a la prospection du Bas-Saint-Laurent, op cit., note 301.

323. Act Respecting the Ministère de l'Énergie et des Ressources, R.S.Q. 1977, c. M-15.1, as amended, s. 12 (3).

324. Ibid., s. 16.

325. Per Mr. Michel Miron of Energy, Mines and Resources Canada, telephone conversation, May 8, 1988.

326. Department of Regional Industrial Expansion Act, S.C. 1980-81-82-83, c. 167, as amended.

327. Ibid., s. 5.1(c).

328. For more information see, for example, M.K. McMullen, Energy, Mines and Resources Canada, "Canadian Federal-Provincial Mineral Development Agreements and the Role of Industrial Minerals", Presentation at the Annual Meeting of the Society of Mining Engineers Inc. (SME, Denver, Colorado, February 23-27, 1987, Paper 87-69.

329. Per telephone conversation with Mr. Michel Miron, op cit..

330. Department of Regional Industrial Expansion Act, op cit., s. 6.

331. Quebec Financial Administration Act, R.S.Q. 1977, c. A-6, as amended.

332. Regulation respecting the promise and awarding of grants, O.C. 186-81, (1981) 113 Quebec Official Gazette II, 389.

333. Ibid., s. 4.

334. Federal Financial Administration Act, R.S.C. 1970, c. F-10, as amended.

335. Federal Government Contract Regulations, J.R.C. 1978, c. 701, as amended.

336. Ibid., s. 2.

337. Information concerning PAP derived from Yukon Department of Economic Development: Mines & Small Business brochure entitled Prospectors' Assistance Program -- General Information, dated 05/23/85, from typewritten manuscript of speech delivered by Mr. John Maissan, Director, Energy and Mines Branch entitled "GEOSCIENCE -- PRESENTATION" (1987), and telephone conversations with Mr. John Maissan (February 18, 1988) and Mr. Rod Hill (April 7, 1988) of the Yukon Department of Economic Development: Mines and Small Business.

338. Figures are approximate, given overlap from one year to another. Some applications are rejected, others withdraw on their own.

339. Interim figures. The same qualifications as per footnote 338 apply.

340. Per Maissan, GEOSCIENCE -- PRESENTATION, op cit., note 337.

341. According to Mr. Rod Hill, the approval and processing times vary depending on whether or not a large bunch of claims arrive at the same time or not.

342. Per Prospector's Assistance Program -- General Information, op cit., note 337.

343. Ibid.

344. Ibid.

345. Information derived from same sources as footnote 337, *op cit.*, and Yukon Economic Development: Mines & Small Business publication entitled Exploration Incentives Program -- General Information, dated 01/03/86.

346. The same provisos as per footnotes 338 and 339 apply here.

347. R.S.Y.T. 1986, c. 65.

348. Per s. 15, *ibid.*

349. S.Y.T. 1987, c. 1. See also Schedule C to the Second Appropriation Act, 1987-1988, S.Y.T. 1987, c. 20.

350. For example, Schedule A Vote 7 to Fifth Appropriation Act, 1986-1987 S.Y.T. 1987, c. 9.

351. See Energy, Mines and Resources Canada News Release "Canadian Exploration Incentive Program Introduced for Resource Industries" 88/73, Ottawa, May 3, 1988; see also "Notes for a Speech by the Honourable Gerald S. Merrithew, Minister of State for Forestry and Mines Announcing the Canadian Exploration Incentive Program at a Press Conference", May 3, 1988, 88/74; see also "Statement by the Honourable Marcel Masse, M.P. for Frontenac and Minister of Energy, Mines and Resources at the Announcement of the Canadian Exploration Incentive Program (CEIP)", Ottawa, Ontario, May 3, 1988, 88/75; see also Department of Finance News Release, "Six-Month Extension of Mining Exploration Depletion Allowance for Individuals," Ottawa, 88-53, May 3, 1988.

352. Per Energy, Mines and Resources Canada News Release 88/73, *ibid.*, at p. 2.

353. Per Masse Statement, 88/75, *op cit.*, note 351, at p. 1.

354. *Ibid.* The CEDIP initiative is discussed in more detail *infra*.

355. Ibid., at p. 1.
356. Ibid.
357. Ibid., at p. 2, and see Department of Finance News Release, 88-53, op cit., note 351, at p. 1.
358. According to the May 3, 1988, News Release of the Department of Finance, 88-53, op cit., note 351, a six-month extension of the 33 1/3 percent MEDA to December 31, 1988 was introduced "during the transition to a new Canadian Exploration Incentives Program, ...announced today." (p.1).
359. Per Energy, Mines and Resources Canada News Release 88/73, op cit., note 351, at p. 1.
360. Ibid., at p. 3 (Page 1 of "Backgrounder").
361. Ibid.
362. Ibid.
363. Ibid., at p. 3 of "Backgrounder".
364. Ibid.
365. Ibid.
366. Ibid., at p. 2 of News Release.
367. Telephone conversation with Dr. K. Brewer, Director General, Economic and Financial Policy Branch, Energy, Mines and Resources Canada, May 10, 1988.
368. S.C. 1987, c. 18.
369. Ibid., s. 28.
370. Ibid., s. 32.
371. Ibid., ss. 12 - 15.
372. Ibid. s. 15.
373. Ibid., ss. 16 - 19.
374. Ibid., ss. 21 - 22.
375. Ibid., s. 23.

376. Ibid., s. 24.

377. Roger S. Smith, in "Tax Expenditures: An Examination of Tax Incentives and Tax Preferences in the Canadian Federal Income Tax System", Canadian Tax Papers No. 61, July 1979, Canadian Tax Foundation, at p. 1 states as follows ...

...governments can provide assistance, encouragement or relief to private-sector activities and individuals through various special provisions in the tax system. In order to provide this assistance or relief the government forgoes tax revenues, thus in a sense making an *indirect* expenditure through the tax system. *These indirect expenditures, which generally take the form of "special" exemptions, deductions, credits, exclusions, preferential rates, or deferrals are what are referred to as "tax expenditures".* [italics by Smith; footnotes omitted].

378. G.T.E. Sylvania Canada Limited v. The Queen [1974] F.C. 726 (Federal Court Trial Division); and The Queen v. G.T.E. Sylvania Canada Limited [1974] 2 F.C. 212 (Federal Court of Appeal).

379. Per Cattanach, J. (Trial Division) at p. 734 (of Sylvania, *ibid.*, [1974] F.C. 726); per Jackett, C.J., (Court of Appeal) at p. 213 (of Sylvania, *ibid.*, 2 [1974] F.C. 212).

380. Sylvania [1974] F.C. 726, *op cit.*, note 378, at p. 733.

381. *Ibid.*, at p. 737.

382. Sylvania [1974] 2 F.C. 212, *op cit.*, note 378, at p. 213.

383. S.C. 1960, c. 44, (R.S.C. 1970, Appendix III)

384. Part I of Constitutional Act, 1982 [enacted by Canada Act, 1982 (U.K.) c. 11 as Schedule B].

385. Adherents to the social contract school of thought might maintain that society agrees to allow the State to perform certain acts of force, and that thus the act of State taxation is not unilateral. However, in relation to the individual concerned, there would appear to be little room for argument that the State can take income from individuals and does not need prior consent

from those individuals.

386. Discussed supra at Part One: II. Flow-Through Shares D. Administration and Enforcement. Traditionally, taxing statutes have been characterized as penal legislation: see Grover & Iacobucci, Materials on Canadian Income Tax, Fifth Edition (1981) at pp. 62 - 65.

387. Dr. Patrick Robardet, "The Canadian Charter of Rights and Freedoms as the Framework for Emerging Bureaucratic Values in Canada: Administrative Responsibility and Activist Public Servants", Paper presented at the Vth Conference on Public Policy and Administrative Studies, April 22-23, 1988, University of Guelph, Ontario.

388. Ibid., at pp. 4 - 5.

389. Characterization of the tax system as primarily a device for revenue collection and not for dispensation of public funds is supported by statements such as the following from Roger S. Smith, in "Tax Expenditures: An Examination of Tax Incentives and Tax preferences in the Canadian Federal Income Tax System", op cit., note 377, at p. ix:

This book is about the various provisions in the Canadian income tax system which might in some sense be considered "special" [i.e., those provisions "which result in lower income tax revenues owing to the preferential treatment of certain economic activities, income, or individuals"]. This is to say that there is no good reason to consider the provision as an inherent part of a normative or ideal income tax system given certain widely accepted standards for income taxation.

See also Grover and Iacobucci, Materials on Canadian Income Tax Sixth Ed., 1985, Richard Deboo, Don Mills, Ont., at p. 65.

390. The obligations attaching to tax officials arise from provisions in tax statutes and regulations, from other legislation such as the Canadian Charter of Rights and Freedoms,

and from non-legally binding sources such as the "Declaration of Taxpayer Rights" (set out at p. 108 of Vol. XII, No. 8, April 1985 Canadian Tax News).

391. See footnote 389, *supra*.

392. The general rule of strict interpretation of tax statutes, which holds that any ambiguities in the charging provisions of a tax statute are to be resolved in favour of the taxpayer is now to be applied in conjunction with another offsetting rule of interpretation for "exempting provisions" which holds that, in a case of a statutory right of deduction, if a taxpayer cannot clearly bring his claim for deduction within the express terms of the provision conferring the right of deduction he is not entitled to it: see *W.A. Sheaffer Pen Co. Ltd. v. M.N.R.* [1953] Ex. C.R. 251 (Exch. Ct.) per Thorson P. at p. 255, and *Stuart Investments Ltd. v. The Queen* [1984] 10 D.L.R. (S.C.C.) per Estey, J. at pp. 31 - 32.

393. The author is relying on EMR statements that CEIP will in law and practice operate the way they say it will.

394. As discussed in Part Two: V. The Canadian Exploration Incentive Program, *supra*.

395. Elaborating on the position adopted above with respect to the coercive nature of taxing legislation, there is less attention paid in grant legislation to structuring discretion and providing remedies for unsatisfied grant applicants or recipients because grant legislation is not predominantly coercive or penal, as are taxing statutes.

396. See, for example, discussion of American interpretations in A. Willcox, "The Function and Nature of Grants", (1970) 22 Admin. Law Rev. 125 - 137; R. Capalli, "Federal Grant Disputes: The Lawyer's

Next Domain", (1979) Urban Lawyer Vol. 11, No. 3, 377-395;

M. Mason, "Current Trends in Federal Grant Law-Fiscal Year 1976"

(1976) 35 Federal Bar Journal 163 - 189.

397. See, for example, A. Willcox, "The Function and Nature of Grants", *ibid.*, at p. 127.

398. Capalli, in "Federal Grant Disputes..." *op cit.*, note 396, at p. 308, attributes this remark to A. Willcox, in "The Function...", *op cit.*, note 396, but the author could find no such unequivocal statement in the Willcox article.

399. Capalli, *ibid.*

400. For example, *Smith v. Board of Commissioners* 259 F. Supp. 423 (1966).

401. For example, *Shapiro v. Thompson* 394 U.S. 618 (1969).

402. Gellhorn and Byse, in their American treatise *Administrative Law* (5th ed., 1970) at 548 state...

But Uncle Willie (i.e. a private donor) is not, after all, the government and he therefore need not be mindful of the Constitution.

403. As discussed in Willcox, *op cit.*, note 396, at p. 128.

404. Willcox, in *op cit.*, note 396, reports that his has in fact happened in *Oregon and California R.R. v. United States* 238 U.S.

393.

405. *Guerin v. Canada* [1984] 55 N.R. 161.

406. *Ibid.*, at pp. 164 - 178.

407. *Ibid.*, at pp. 178 - 192.

408. *Ibid.*, at pp. 192 - 193.

409. *Ibid.*, at p. 175.

410. *Ibid.*, at p. 171.

411. (1975) 25 Univ. of Toronto L.J. 1 - 22.

412. *Guerin v. Canada*, *op cit.*, note 405, at p. 175.

413. Ibid., at pp. 184 - 185.

414. Capalli, op cit., note 396, at p. 379.

415. Willcox, op cit., note 396, at p. 127.

416. See, for example, J.F. Donnelly, **A Treatise on the Law of Public Contracts** Boston: Little, Brown and Co. 1922.

417. *Bossier Parish School Board v. Lemon* 370 F. 2d 647 (5th Cir.), cert. denied, 388 U.S. 911 (1967).

418. It has long been a principle of the English common law that none but parties to a contract can sue on the contract or any of its terms: *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.* [1915] A.C. 847 (H.L.); *Great Northern Ry. Co. v. Cole Agencies Ltd.*, (1964), 49 W.W.R. 153. To a limited extent, the law of agency has been used to permit the extension of the benefit of an exemption clause to a third party: see generally, G.H.L. Fridman, *The Law of Contract in Canada* (Toronto: Carswell, 1976), pp. 416 - 418. An argument that the private citizen and the government are principal and agent might have some validity in political theory, but it does not appear to be supported in law. While many authorities have urged reform of the privity doctrine (i.e., see Fridman, p. 427), to date it has not been significantly altered. In English contract law, there does not appear to be a distinction made between public and private contracts with respect to the privity of contract principle: see, for example, Colin Turpin, *Government Contracts* (Suffolk, Penguin, 1972) at pp. 213 - 214.

419. Capalli, op cit., note 396, at p. 379.

420. Capalli, op cit., note 396, at p. 380.

421. See generally Capalli, op cit., note 396, and Willcox, op cit., note 396.

422. For example, there is the U.S. Federal Grant and Cooperative

Agreement Act, 1977 41 U.S.C. 501 - 509 (Supp. 1978).

423. Administrative Procedure Act, 5 U.S.C. para. 706(2)(a) 1976.

424. Grover and Iacobucci, **Materials on Canadian Income Taxation** (6th Ed., 1985) *op cit.*, note 389, at p. 94.

425. *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police and Attorney-General of Ontario* [1979] 1 SCR 311.

426. *Ibid.*, at p. 324.

427. See brief discussion *infra*, and more detailed analysis in D. Mullan, "The Developing Law of Procedural and Substantive Fairness", in E. Case et al., **Fairness in Environmental and Social Impact Assessment Processes**, Calgary, 1983, pp. 16 - 28; D. Mullan in "Natural Justice - The Challenges of *Nicholson*, Deference Theory and the *Charter*", in N. Finkelstein and B. Rogers, eds., **Recent Developments in Administrative Law Toronto: Carswell**, 1987, at pp. 1 - 52; J. Grey, "The Duty to Act Fairly After *Nicholson*" (1980), 25 McGill L.J. pp. 598 - 608; and P. Garant and C. Dussault, "L'équité procédurale et la révolution tranquille du droit administratif" (1985-1986) 16 R.D.U.S. at pp. 495 - 540.

The following discussion draws substantially on these sources.

428. [1980] 1 SCR 602.

429. *Ibid.*, at pp. 629 - 630.

430. *Ibid.*, at p. 628.

431. Mullan, "Natural Justice -- The Challenges ..." *op cit.*, note 427, at p. 22.

432. *Ibid.*

433. The expression was coined by M. Redish and L. Marshall in "Adjudicatory Independence and the Values of Procedural Due Process" (1986) 95 Yale L.J. 455.

434. Mullan, "Natural Justice -- The Challenges...", *op cit.*, note

427, at p. 51.

435. Gellhorn and Byse, *Administrative Law* (5th ed., 1970) at p. 548, as cited in Evans, Mullan, Janisch and Risk, *Administrative Law Cases, Text and Materials*, 1980, Emond-Montgomery Ltd., Toronto, at pp. 61 - 62. Note, however, that Gellhorn and Byse end this discussion with the following statement:

But Uncle Willie [i.e. a private donor] is not, after all, the government and he therefore need not be mindful of the Constitution. Does governmental generosity stand on different footing from Uncle Willie?

436. Davis, *Administrative Law Text*, (3rd ed., 1972), pp. 175 - 176, as cited in Evans, Janisch, Mullan, Risk, *op cit.*, note 435, at pp. 62 - 63.

437. *Dowhopluk v. Martin et al.* (1972) 1 O.R. 311 (Ont. H.C.).

438. *Ibid.*, at p. 315.

439. *Ibid.*, at p. 319.

440. Davis, *op cit.*, note 436, at pp. 175 - 176.

441. de Smith, *Judicial Review of Administrative Action* (3rd ed., 1973), at p. 67.

442. *Re Harvie and Calgary Regional Planning Commission* (1978) 94 D.L.R.(3d) 19(Alta. S.C.A.D.).

443. *Scarborough Community Legal Services v. The Queen* [1985] 2 F.C.555 (Fed. C.A.).

444. Discussed in *Scarborough*, *ibid.*, at pp. 571 - 573, per Marceau, J..

445. *Minister of National Revenue v. Coopers & Lybrand* [1979] 1 S.C.R. 495. The criteria, as set out in the decision at p. 504, are:

(1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggest that a hearing is contemplated before a decision is reached?

(2) Does the decision or order directly or indirectly affect the rights and obligations of persons?

(3) Is the adversary process involved?

(4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

446. Scarborough, op cit., note 443, at p. 576.

447. Ibid.

448. Ibid.

449. Renaissance International v. Minister of National Revenue [1983] 1 F.C.860 (F.C.A.).

450. Scarborough, op cit., note 443,, per Urie, J. at pp. 569 - 570. See also Marceau, J. at pp. 575 - 576.

451. Ibid., at p. 562.

452. Ibid., at p. 564.

453. British Oxygen Co. Ltd. v. Minister of Technology [1971] A.C. 610 (H. of L.).

454. Ibid., at p. 624.

455. Re Maple Lodge Farms Ltd. and Government of Canada et al. (1980) 114 D.L.R. (3d) 634 (Fed.C.A.) affirmed by S.C.C. [1982] 137 D.L.R. (3d) 558.

456. Ibid., (Fed.Ct.C.A.), at p. 645. See also Jacobs Farms Ltd., Jacobs et al. v. Agricultural Stabilization Board [1982] 40 N.R. 115 (S.C.C.) where Laskin, C.J.C. (speaking for the Court) held that the Agricultural Stabilization Board was authorized by statute to impose upper and lower limits on subsidies for apple producers, and that apple producers were not entitled to subsidies. Laskin, C.J.C. distinguished Jacobs from British

Oxygen:

I am bound to agree with counsel for the appellant that

the British Oxygen case deals with legislation of a different order, much different from that in the present case.

Here, the question whether a subsidy will be paid is not left to uncontrolled administrative discretion, but stems from the promulgation of a program in pursuance of the Agricultural Stabilization Act and in accordance with its provisions.

457. Padfield v. Minister of Agriculture, Fisheries and Food [1968] A.C. 997 (H. of L.).
458. Ibid., see especially Lord Reid's judgement at pp. 1032 - 1033.
459. Moser v. R. in Right of British Columbia [1982] 1 WWR 272 (BCSC).
460. R.S.B.C. 1960, c. 176 [now R.S.B.C. 1979, c. 167].
461. Ibid., at p. 280.
462. Ibid., at pp. 281 - 282.
463. See, for example, comment to this effect by Mullan in "Natural Justice -- The Challenges ..." op cit., note 427, at p. 2.
464. McInnes v. Onslow Fane and another [1978] 3 All E.R. 211 (Eng. Ch. D.).
465. Per Megarry, V.C., speaking for the court in Ibid., at p. 219.
466. Ibid., at p. 220.
467. Ibid., at p. 223.
468. Re Maple Lodge Farms, (Fed.C.A.) op cit., note 455.
469. Ghuman v. Minister of Transport et al. (1983) 2 Admin.L.Rep. 1 (Fed.T.D.).
470. Ibid., at p. 7.
471. Ibid.
472. Allard Contractors Ltd. v. District of Coquitlam et al. (1983) 3 Admin.L.Rep. 122 (B.C.S.C.).
473. Ibid., at p. 139.

474. Ibid., at p. 140.

475. Transhelter Group Inc. v. Committee on Works & Operations (1984), 9 Admin.L.Rep. 187 (Man. C.A.).

476. The reasoning of Monnin, C.J.M. in Transhelter was based on old, somewhat out-dated cases: see comment to this effect by C. Harvey at (1984) 9 Admin.L.Rep. 187 on this point.

477. Re Webb and Ontario Housing Corporation (1978) 93 D.L.R. (3d) 187 (Ont. C.A.).

478. Ibid., at p. 195.

479. Ibid., at pp. 194 - 195.

480. Inuit Tapirisat of Canada et al. v. Leger et al. (1978) 95 D.L.R. (3d) 665 (Fed.C.A.). Note that this decision was reversed by the Supreme Court of Canada Attorney General of Canada v. Inuit Tapirisat of Canada [1980] 2 S.C.R. 735.

481. Webb, op cit., at p. 195.

482. Renaissance International v. Minister of National Revenue [1983] 1 F.C. 860 (Fed. C.A.).

483. Garand v. Société d'Habitation du Québec (1984), 14 Admin.L.R. (Que. S.C.).

484. Canadian Bill of Rights, S.C. 1960, c. 44 (R.S.C. 1970, Appendix III).

485. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 [en. by Canada Act, 1982 (U.K.) c. 11, Sched. B.].

486. Section 15, as a result of s. 32 (2) which states that section 15 shall not have effect until three years after it came into force (i.e., April 17, 1982).

487. Dowhopluk v. Martin et al. (1971) 23 D.L.R. (3d) 42.

488. See, for example, Goldberg v. Kelly, 397 U.S. 254 (1970)

U.S.S.C..

489. R. v. Colgate Palmolive Ltd. (1971) 2 C.C.C. (2d) 40.

490. Board of Regents v. Roth 408 U.S. 564 (1972) U.S.S.C..

491. International Association of Longshoremen, Local 1657 et al. v. The Queen in Right of Canada et al. (1979) 114 D.L.R. (3d) 335 (Que. C.A.).

492. Prata v. Minister of Manpower and Immigration [1976] 1 S.C.R. 376 (S.C.C.).

493. D. Mullan; "Natural Justice -- The Challenges...", op cit., note 427, at p. 35; see also, generally, W. MacKay, "Fairness after the Charter: A Rose by Any Other Name?" (1985), 10 Queen's L.J. 263 - 335.

494. See, for example, R. v. Big M Drug Mart [1984] 1 W.W.R. 625 where the majority judgement of the Alberta Court of Appeal seems to have concluded that the term "everyone" included a corporation. See also, Union Colliery Co. v. The Queen (1900) 4 C.C.C.400.

495. The Interpretation Act, 1978 (U.K.) c. 30, Sch. 1 defines the word "person" as including "a body of persons corporate or incorporate".

496. McLeod, Takach et al. (eds) The Canadian Charter of Rights -- The Prosecution and Defence of Criminal and Other Statutory Offences (Carswell, 1983) Toronto.

497. Ibid., para. 25.3.

498. See, for example, Re Aluminum Co. of Canada Ltd. and The Queen (1986), 29 D.L.R. (4th) 583 (Div.Ct.); Surrey Credit Union v. Mendonca et al. (1985), 65 B.C.L.R.310 (B.C.S.C.).

499. K. Swinton, "Application of the Canadian Charter of Rights and Freedoms", in Tarnopolsky and Beaudoin (eds.), The Canadian Charter of Rights and Freedoms -- Commentary (Carswell, 1982),

Toronto, pp. 41 - 60, at p. 52.

500. Ibid., at p. 53.

501. See, for example, the judgement of Dickson, J. in *Melvin v.*

The Queen in Right of New Brunswick (1982) 40 N.B.R. (2d)

~~42(N.B.Q.B.) at pp. 33 - 54.~~ Note, however, that at appeal, the

majority judgement was less than receptive to Dickson's expansive interpretation. (Paraphrased from footnote 80 of D. Mullan,

"Unfairness in Administrative Processes: The Impact of Nicholson and the Charter of Rights", in Justice Charles Huband, chairman,

Isaac Pitblado Lectures on Advocacy Right and Remedies-New

Developments, Law Society of Manitoba: February, 1983, pp. 68 -

99 at p. 92).

502. Mullan, "Unfairness...", *ibid.*, at p. 77.

503. See, for example, *Re Kuntz and College of Physicians and*

Surgeons of British Columbia (1987), 4 A.C.W.S. (3d) 337

(B.C.S.C.); see also, *Re Workers' Compensation Board of Nova*

Scotia and Coastal Rentals, Sales & Service Ltd. et al. (1983) 12

D.L.R. (4th) 564 (N.S.S.C.).

504. Reference *Re s. 94 (2) of the Motor Vehicle Act (B.C.)* [1985]

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505. W. Tarnopolsky, "The Equality Rights", in Tarnopolsky and

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499, pp. 395 - 442, at p. 421.

506. *Attorney General for Canada v. Lavell* [1974] 2 S.C.R. 1349

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507. *Prata v. Minister of Manpower and Immigration* (1972) 31

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508. *Bliss v. Attorney General for Canada* (1978) 82 D.L.R. (3d) 417

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509. Ibid., at p. 423.

510. Ontario Public Service Employees Union et al. v. National Citizens Coalition Inc. et al. (1987) 39 D.L.R.(4th) 449.

511. Ibid., at p. 452.

~~512. Tarnopolsky, op cit., note 505, at p. 422.~~

513. Surrey, "Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures" 83 Harv. L.Rev. (1970) 705 - 738 at p. 734.

514. For example, see "Study Shows Firms Favour Tax Breaks," The Globe and Mail, 17 March 1983, p. B8.

515. Report to The Government of British Columbia by the Mineral Industry Task Force, British Columbia February, 1987, at p. 71.

516. R. Parsons, "A Future for flow-through?" CIM Bulletin, November, 1987, pp. 78 - 80, at p. 79.

517. In establishing the Canadian Exploration and Development Incentives Program, government officials rejected the idea of a tax-based initiative and instead selected a grant partly because "introducing the new incentive through the tax system at a time when the Minister of Finance was looking at major tax reform would subject the Program to possible modification or elimination through such reform": per Regulatory Impact Analysis Statement, appended to the Canadian Exploration and Development Incentive Program Regulations, Canada Gazette, Part II, Vol. 121, No. 18, SOR 87-514, P.C. 1987-1683, August 14, 1987.

518. Thus, for example, the recently announced Canadian Exploration Incentive Program will be administered through existing EMR offices in Calgary and Weyburn, and in new regional offices (per Energy, Mines and Resources Canada, "Canadian Exploration Incentive Program Introduced for Resource Industries", News

Release 88/73, May 3, 1988, at p. 2).

519. The Canadian Exploration Incentive Program is intended to operate in the same "automatic" manner as tax incentives: see comment to this effect in "Notes for a Speech by The Honourable Gerald S. Merrithew, Minister of State for Forestry and Mines Announcing the Canadian Exploration Incentive Program", News Release 88/74, May 3, 1988, at p. 2.

520. The federal Petroleum Incentives Program (PIP), promulgated pursuant to the ill-fated National Energy Program was a highly structured, almost mechanical grant initiative, which involved use of circulars, etc. as is common with tax administration. For description and analysis of PIP see K. Webb, "The Petroleum Incentives Program -- An Alternative to Tax-Based Subsidies" (paper submitted to Professor J.P. Lacasse, University of Ottawa, Masters of Law Course on Taxation of Resource Industry, 1984).

521. See comment to this effect in CEDIP Regulatory Impact Analysis Statement, op cit.

522. For elaboration on this point regarding tax shelters generally, see S. Surrey and P. McDaniel, in Tax Expenditures (Harvard Univ. Press, 1985), at p.105.

523. Per Dr. K. Brewer, Director General, Economic and Financial Policy Branch, Energy, Mines and Resources Canada, telephone conversation, May 10, 1988.

524. See Carten, "Flow-through Share Financing", in Income Tax Considerations in Corporate Financing, Corporate Management Tax Conference, 1986, Canadian Tax Foundation, pp. 385 - 410 at p.

397. It should be noted that the PIP grants could be sold through a flow-through share arrangement in exchange for prescribed shares "the terms of which allowed the investor to recover a portion of

his investment and a negotiated after-tax return."

525. British Columbia Mineral Industry Task Force, Report to the Government of British Columbia by the Mineral Industry Task Force, February, 1987, at p. 71.

526. See, for example, L. McQuaig, "It's a Writeoff", Report on Business Magazine, May 1988, pp. 85 - 91.

527. Expression used by Professor Neil Brooks of Osgoode Hall Law School, as quoted in McQuaig, *ibid.*, at p. 89.

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