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Land Claim and Statutory Water Compensation Regimes in the Mackenzie Valley

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Introduction to the Northern Water Compensation System

A compensation system for water licence holders adversely affected by new water uses is an integral part of the Crown's scheme for Northern water rights management which is based on the prior allocation model.[1] This statutory scheme is based in the *Northwest Territories Waters Act*[2] (NWTWA). Since they were ratified, chapters 19 and 20 of the Gwich'in[3] and Sahtu[4] land claims, respectively, grant special water rights and interests to the participants in those claims. These land claims provide for a right to compensation when land claim based water rights are adversely affected by new water uses. In the Mackenzie Valley, the interrelationship between statutory water compensation provisions and the new scheme of water rights and compensation found in land claims is complex. This compensation regime is nonetheless important given recent intensified interest in oil and gas exploration and development in these areas.

Government, First Nations, and most importantly, the tribunals vested with responsibility for deciding on compensation questions under these systems, the land and water boards, need to achieve a common understanding of these compensation systems in order to contribute to the sustainable management of water resources and to achieve the certainty of water rights necessary to encourage development in the oil and gas and mining industries.

In December 1998, land and water boards established under the *Mackenzie Valley Resource Management Act*[5] (MVRMA) replaced the Northwest Territories Water Board in the Gwich'in and Sahtu settlement areas for purposes of water use regulation and management.[6] These Board work in a complex legal and regulatory environment which must accommodate special land claim rights to water and which must integrate the provisions of the MVRMA and the NWTWA and its regulations.

This article will provide an overview water rights compensation systems in the Mackenzie Valley beginning with the water compensation system found in the NWTWA. Next it will review the integration of the statutory water compensation system with land claim water rights. The article concludes with some comment on experience to date with the adjudication of water compensation claims.

The Water Management and Compensation Systems

Part 3 of the MVRMA contains the provisions outlining the land and water boards' jurisdiction and responsibilities

Résumé

Dans la vallée du Mackenzie, les ententes sur les revendications territoriales des Gwich'in et du Sahtu accordent de nouveaux droits relatifs à l'eau aux participants de ces ententes. Ces droits incluent des droits relatifs à la qualité et à la quantité des eaux des terres visées aux ententes. Ces nouveaux droits sont protégés par un système d'indemnisation qui complète et élargit le système prévu à l'article 14 de la Loi sur les eaux des Territoires du Nord-Ouest. Cet article décrit et explique le système d'indemnisation des droits relatifs à l'eau prévu par ces ententes. L'auteur examine également l'expérience acquise à date et les questions de mise en oeuvre afférentes à ce nouveau systéme d'indemnisation.

for water management. Part 3 of the MVRMA does not replace the NWTWA. Instead, Part 3 makes the changes necessary to adapt that Act and to make the water management regime in the Sahtu and Gwich'in settlement areas consistent with the requirements of the land claims. As a result, the NWTWA continues to apply in the Mackenzie Valley in a modified manner.

In order to fully understand the new Mackenzie Valley water management regime, Part 3 of the MVRMA and the NWTWA must be read together. The modified water use regulation and management system outlined in Part 3 of the MVRMA is based upon and supplemented by the NWTWA and the Northwest Territories Waters Regulations.[7]

Section 58 of the MVRMA, specifies that the land and water boards shall regulate the use of waters and the deposit of waste so as to provide for the conservation, development and utilization of water resources. Section 60 of the MVRMA outlines the jurisdiction of land and water boards with respect to water and waste. That jurisdiction is established by reference to the NWTWA. A land and water board has jurisdiction in respect of all uses of waters and deposits of waste in a settlement area for which a licence would be required under the NWTWA.[8] These responsibilities include adjudicating compensation claims under both the NWTWA and the Sahtu and Gwich'in land claims.

A land and water board may issue, amend, renew and cancel licences and approve the assignment of licences in accordance with the NWTWA. It may also exercise any other powers of the Northwest Territories Water Board under that Act. A land and water board may suspend a licence for a specified period where the licensee contravenes the provisions of the NWTWA, or of Part 3 of the MVRMA, or a term or condition of a licence.

Subsection 60(4) lists those provisions of the NWTWA which do not apply in respect of a settlement area for which a land and water board has been established. Review of the provisions of the NWTWA listed in subsection 60(4) of the MVRMA indicates that these exemptions do not result in any gaps in the water use regulation and management system. In one way or another, the MVRMA or the land claims provide for all the exempted requirements and functions. All of the major elements of the NWTWA water management system with which the oil and gas and mining industries have long been familiar are still in place under the new statute.[9]

Sections 73 to 76 of the MVRMA are included to give effect to and protect the special aboriginal water rights negotiated through the Gwich'in and Sahtu land claim agreements.[10] Sections 77 to 79 of the MVRMA reflect the water compensation arrangements negotiated by the Gwich'in and Sahtu First Nations in their land claims to further protect their settlement lands and aboriginal water rights.[11] A review of these MVRMA provisions, of their relationship to the provisions in chapter 20 of the Sahtu land claim is provided below but first, the NWTWA compensation system must be outlined.

The *Northwest Territories Waters Act* Compensation System

The compensation system found in the *Waters Act* creates statutory rights to claim compensation during the licensing process. This means that any persons advancing a compensation claim (a claimant) must convince the land and water board that they qualify or can bring themselves within one of the classes of potential claimants established by the NWTWA. There are other requirements which a claimant must meet, specified in the *Waters Act* and they are discussed below. The important point, however, is that if a claimant cannot meet the statutory requirements the land and water board cannot award compensation to them.

The statutory and land claim based water compensation systems are not mutually exclusive. In the right circumstances, it is possible that a participant could advance a claim in response to a licence application under both the statutory system and under chapter 20 of the SFA.

In terms of their water management responsibilities, land and water boards are primarily licensing authorities. The Northwest Territories Waters Regulations, however, authorize certain uses of water without a licence.[12] Compensation issues arising from any authorized or illegal activities cannot be determined by a land and water board. They must be dealt with through the courts.

From the outset, we must also distinguish claims for compensation under the *Waters Act* from any common law claims for damages which might be based on riparian rights or some other alleged proprietary interest in NWT waters. Any such claim would also have to made before the courts. They are not matter within the land and water board's jurisdiction.[13]

The heart of the statutory compensation system is found in paragraphs14(4)(a) and (b) of the NWTWA. These provisions are complex and must be carefully studied as a basis for understanding the water compensation process.

Compensation Under Paragraphs 14(4)(a) and (b) of the NWT Waters Act

Paragraphs 14(4)(a) and (b) must be studied in detail to properly characterize the NWTWA's compensation process and to identify a land and water board's role and authorities. These paragraphs are reproduced in their entirety below:

"s. 14(4) - Where an application for a licence is made, the Board shall not issue a licence **unless the applicant satisfies the Board** that:

(a) either

(i) the use of waters of the deposit of waste proposed by the

applicant would not adversely affect, in a significant way, the use of waters, whether in or outside the water management area to which the application relates:

(A) by any existing licensee, or

(B) by any other applicant whose proposed use of waters would take precedence over the applicants proposed use by virtue of section 29, or

(ii) every licensee and applicant to whom subparagraph (i) applies has entered into a compensation agreement with the applicant,

(b) compensation that the Board considers appropriate has been or will be paid by the applicant to any other applicant described in clause (a)(i)(B) but to whom paragraph (a) does not apply, and to:

(i) licensees to whom paragraph (a) does not apply,

(ii) domestic users,

(iii) instream users,

(iv) authorized users,

(v) authorized waste depositors,

(vi) owners of property,

(vii) occupiers of property, and

(viii) holders of outfitting concessions, registered trapline holders, and holders of other rights of a similar nature

who were such licensees, users, depositors, owners, occupiers or holders, whether in or outside the water management area to which the application relates, at the time when the applicant filed an application with the Board in accordance with the regulations made under paragraphs 33(1)(d) and (e), who would be adversely affected by the use of waters or deposit of waste proposed by the applicant, and who have notified the Board in response to the notice of the application given pursuant to subsection 23(1) and within the time period stipulated in that notice for making representations to the Board; ...." (emphasis added)

Before breaking out these paragraphs and discussing them, we should note that subsection 14(4) prevents the Board from granting a licence until compensation matters (among other things) are dealt with and it places the onus on the applicant to satisfy the Board on these matters. It should also be pointed out that both paragraph 14(4)(a) and (b) may have to be satisfied before a licence can be issued. Paragraph 14(4)(a) covers existing licensees and applicants with precedence. Paragraph 14(4)(b) covers other potential compensation claimants, if any.

Paragraph 14(4)(a) -

There are two ways to satisfy the requirements of this paragraph:

1) An applicant for a licence can satisfy the Board that the proposed water use will not have significant adverse effects on existing licensees or applicants who have precedence; or

2) The applicant can show the Board that every existing licensee or applicant with precedence that is adversely affected in a significant way by the proposed use of water has entered into a compensation agreement with the licence applicant.

Several points should be highlighted in our discussion of paragraph 14(4)(a).

First, the determination of whether the effects of the proposed licensed use are significant and adverse is for the Board to make. Clearly the Board's obligations under subsection 15(2) of the NWTWA to minimize the adverse effect of a licence on other water users are relevant to the manner in which such a determination is made. It is suggested that the significance of any adverse effects should be evaluated after taking into account licence terms and conditions which, if applied, would mitigate the adverse effects. While the issue of significance is a matter for the Board to determine, and is therefore subjective, the NWTWA provides no clear "test" for significance.[14]

If an applicant can satisfy the Board that no significant adverse effects will result from the proposed licensed use, then no compensation is payable under paragraph 14(4)(a). If the Board is not satisfied that there are no significant adverse effects and the applicant has not negotiated compensation agreements, the Board cannot grant a licence.

Second, if significant adverse effects appear likely, the applicant could simply negotiate compensation agreements with any existing licensees and applicants with precedence which might be affected by the proposed water use. These negotiations would be private. The Act gives no oversight role to the Board with respect to such agreements. Neither is the Board given the authority to inquire into the adequacy of compensation negotiated under subparagraph 14(4)(a)(ii). The applicant would only be required to produce proof sufficient to satisfy the Board that agreements have been reached.

Paragraph 14(4)(b) -

Eight classes of persons who may be affected by a licence application and therefore claim compensation are listed in this paragraph. If the effects of a proposed licensed water use are adverse, compensation may be required under paragraph 14(4)(b). The test for compensation under this paragraph is merely "adverse effects", not the significant adverse effects as required under paragraph 14(4)(a).

Paragraph 14(4)(b) requires that "compensation that the Board considers appropriate has been or will be paid". An order to make such a payment is an exercise of subjective discretion on behalf of the Board. If compensation has already been paid, under this subsection, it appears, based on the language above, that the Board could consider its adequacy. Because the statute refers to compensation which "has been or will be paid" it appears possible that compensation agreements could be negotiated under paragraph 14(4)(b) as well.

Claimants in the enumerated classes must show that they were a member of that class of water users, inside the water management area to which the licence application relates, at the time the application was made. A paragraph 14(4)(b) compensation claimant must also have notified the land and water board of their claim in response to the notice of the application published in accordance with section 23 of the NWTWA within

the time specified in the published notice. The requirement to give notice of a compensation claim before this deadline has proven contentious in some NWT Water Board proceedings.

If a compensation order is to be made, the land and water board must consider all relevant factors, including the specific factors listed in subsection 14(5) in making its award of compensation. The land and water board must make all reasonable efforts "to minimize any adverse effects of the issuance of the licence" on the classes of users listed in paragraph 14(4)(b).

Land Claim Water Rights and Water Legislation

Parliament enacted the MVRMA in response to chapter 25 of the SFA, and established the Sahtu Land and Water Board (SLWB) as the institution of public government responsible for the regulation and management of the water resources of the Sahtu Settlement Area. The Sahtu land claim, of course, specifies that no law may be in conflict with or be inconsistent with the provisions of the Agreement.[15] Thus, chapter 20 rights would prevail over the applicable water legislation in the NWT, including the MVRMA and the NWTWA, to the extent of any inconsistency or conflict.

In any examination of the relationship between the land claim and statutory frameworks for water rights and compensation, only the provisions of chapter 20 of the SFA and of the MVRMA are relevant. Chapter 25 establishes the framework for land and water and environmental impact assessment found in the MVRMA but does not address water compensation issues. Consequently its provisions do not affect the statutory water compensation system.

Chapter 20 grants unique water rights to Sahtu participants when water is on or flowing through Sahtu lands. This chapter also provides for protection of participants' water rights. Compensation is the central element of the scheme for protecting these rights.

Section 73 of the MVRMA provides a right for the Gwich'in First Nation and the Sahtu First Nation to use waters or deposit waste without a licence for purposes of trapping and non commercial wildlife harvesting other than trapping; for purposes of transportation related to those activities; and for traditional heritage, cultural and spiritual purposes.[16] In the Sahtu land claim, this right is set out in subsection 20.1.13 and is made subject to water legislation.

Sections 8 and 9 of the NWTWA prohibit the use of waters or the deposit of waste in water without a licence. There are some exceptions to these prohibitions and to the requirement for a licence, specifically, for domestic users, instream users and emergency uses such as for the extinguishing of a fire or for controlling or preventing floods. Section 2 of the NWTWA defines an "instream user" as a person using water to earn income or for subsistence purposes. The term "subsistence purposes" is not defined in the Act. Based on NWT Water Board practice to date, there would seem to be little doubt that aboriginal persons using water during the course of hunting, fishing or trapping would be considered instream users. It thus seems that section 73 of the MVRMA merely provides certainty with respect to the exemption from the need for a licence for the activities listed therein.

Subsection 20.1.3 of the Sahtu land claim grants participants the exclusive right to use waters which are on, or flow through Sahtu lands when such waters are on or flowing through these lands, subject to legislation in respect of water use. This exclusive right to use water on Sahtu lands has obvious economic as well as other values. Section 74 of the MVRMA reiterates these rights and exempts them from any effect of section 4 of the NWTWA which specifies that the property in and the right to the use and flow of all waters in the NWT are vested in Her Majesty in right of Canada. Section 74, however, also indicates that the use of water or deposit of waste in water on settlement lands is subject to the provisions of Part 3 of the MVRMA and of the NWTWA. Thus, a use of water on settlement lands by participants of the Sahtu land claims must be licensed, unless the use falls among the statutory exemptions.

The land and water boards must consider the economic and other exclusive interests of the Sahtu participants in the waters which are on or flowing through their lands when the boards are making licensing decisions for participants' and for other exploration and development activities. Such consideration may give rise to questions related to compensation for any water quality or quantity effect which may impact on participants' rights including the exclusive right to use these waters.

In fact, section 75 of the MVRMA reflects subsection 20.1.8 of the Sahtu land claim and repeats the right of the Gwich'in and Sahtu First Nations to have waters on or flowing through their first nation lands,[17] or adjacent to these lands, remain substantially unaltered with respect to quality, quantity or rate of flow.[18] If substantial alteration will result from a licenced activity, compensation must be paid before the licence can be issued. It should be noted that the aboriginal water rights are only protected against *substantial alteration* (emphasis added). Thus, minor effects on these rights should not provide a basis for compensation awards during the licensing process.

The protections for the section 75 rights to water quality, quantity and rate of flow on first nation lands are subject to section 76 of the MVRMA.[19] Section 76 allows a land and water board to issue a licence which would interfere with section 75 rights in the following circumstances: where there is no reasonable alternative to satisfy the needs of the licence applicant; where there are no reasonable measures by which the interference could be avoided; and where compensation has been paid or a compensation agreement has been reached.

The choice of words in section 76 is important. Proving "interference with"

first nation water rights is a less stringent test than the need to prove a "substantial alteration" of quality, quantity or flow of water. There will likely be many more cases where an activity subject to water licencing requirements interferes with first nation water rights than there will be where the activity substantially alters water quality quantity or rate of flow on settlement lands and where compensation must be paid. The section 76 requirements clearly create an additional evidentiary burden for a licence applicants in situations where interference with land claim water rights occurs but compensation may not be payable.

As a result of sections 75 and 76 of the MVRMA it seems likely that land and water boards will give very careful attention to any application for a water licence which might affect first nation water rights or lands.

Subsections 20.1.9 and 20.1.10 of the Sahtu land claim confirm that participants have a cause of action against any person in respect of any use of water not authorized by law which substantially alters the quality, quantity or rate of flow of waters which are on, flow through or are adjacent to Sahtu lands. The Sahtu Secretariat Inc. has standing at all times in a Court of competent jurisdiction to question the authority of any person to alter the quality, quantity or rate of flow of water in the settlement area. Subsection 20.1.9 specifies that the remedies available to participants are the same as if they had riparian rights. Thus, an injunction should be available to restrain any illegal or unauthorized use of water or any licensee using water in a way not provided for in their licence when that activity has substantial effects on section 75 rights.

It is also worth noting that the exclusive right to the use of water on settlement lands has an economic dimension. The Crown may have retained overall property in the water under section 4 of the NWTWA but under section 20.1.3 (a) of the SFA it gave away all rights to use those waters on settlement lands. It may be expected that first nations will seek to derive some economic return from activities on their land which require water to which this right attaches.

Sections 77 to 79 of the MVRMA deal specifically with compensation to offset loss or damage which may result from substantial alterations to the quality, quantity or rate of flow of waters on or flowing through or adjacent to first nation lands. These compensation provisions supplement rather than displace the compensation regime established in subsection 14(4) of the NWTWA. Thus, these two systems act in concert and the NWTWA and MVRMA compensation systems could both be invoked by a participant in the context of a single licence application.

Before a land and water board can issue a licence pursuant to section 76, section 77 requires the negotiation of a compensation agreement between a first nation and a licence applicant whose activities might substantially affect the quality, quantity or rate of flow of water through or adjacent to first nations lands. If negotiation does not result in an agreement, either party may apply to the land and water board for a determination of compensation payable pursuant to subsection 79(1) of the MVRMA.[20]

Section 78 provides for the negotiation of a compensation agreement in a case where a land and water board determines that a use of water or a deposit of waste in the NWT,[21] outside a settlement area, might substantially affect the quality, quantity or rate of flow of water on or adjacent to first nations lands. In such a case, the land and water board must notify the water authority in writing of its determination.[22] That water authority must then provide the land and water board with such information as it needs to make its determination and the water authority is prevented form authorizing any use of water or deposit of waste until either an agreement is reached or the land and water board makes a determination of the compensation payable under subsection 79(1) of the MVRMA.

Subsection 79(2) of the MVRMA identifies special heads of damage, derived directly from section 20.1.17 of the Sahtu claim, which may be taken into account by a land and water board making a determination of compensation payable pursuant to section 77 or 78 of the Act. These heads of damage are specific to the interests of first nations under their land claims. They extend beyond those listed in subsection 14(5) of the NWTWA. They include consideration of the effect of the proposed use or deposit on the first nation's use of waters or on first nation lands, taking into account any cultural or special value of those lands to the first nation. They also include consideration of nuisance or inconvenience, including noise that may result on first nation lands, consideration of the effect on wildlife harvesting carried out by the first nation and of any other factor that the board considers relevant in the circumstances.

Experience with Water Compensation to Date

There have been no claims made to the land and water boards for compensation arising from water licence applications since the MVRMA came in to force in 1998. Thus sections 77 to 79 of the MVRMA have not been tested, nor have the provisions of chapters 19 and 20 of the Gwich'in and Sahtu land claims.

In the period before the MVRMA came in to force, however, the NWT Water Board dealt with two licence processes where compensation was claimed. The first involved the applications for licences N1L4-0154 and N1L5-0154 for the Taltson hydro project by the NWT Power Corporation. The second involved the application for licence N7L2-1616 for the Ekati Mine by BHP Diamonds Inc.

The Yukon Territory Water Board has also dealt with two applications for compensation. The first was in the context of a small placer mining operation, licence number PM95-023, where the Teslin Tlingit Council applied under chapters 14 and 16 of the Umbrella Final

Agreement[23] (UFA) for compensation for effects on land claim based water rights. The second arose in Minto Exploration Ltd.'s application for a class A water licence number QZ96-006.[24]

The NWT Water Board denied compensation to all claimants in the two proceedings mentioned above. The Yukon Territory Water Board denied compensation in the Minto licence proceeding and denied compensation under the UFA in the PM95-023 proceeding but did award nominal compensation to the trapper in that case under the *Yukon Waters Act*.[25]

Review of those compensation cases has identified several issues with respect to the statutory compensation regimes. They are discussed below along with issues which have emerged from the examination of chapter 20 of the Sahtu land claim and the MVRMA.

Water Compensation Systems – Lessons Learned and Some Things to Think About

General Observations

We have reviewed the compensation regimes emerging the NWTWA and from the Gwich'in and Sahtu land claims.[26] We should not be surprised that these compensation regimes have not yet seen extensive use. The land claims are new and were only settled in the early to mid 1990's. The Mackenzie Valley land claims also required implementation legislation in order for these compensation regimes to become fully operational. In the Mackenzie Valley, the land and water boards and the Gwich'in and Sahtu first nations have had only two years since the enactment of the MVRMA to realize the potential of these regimes and to develop the familiarity necessary to apply them to protect their rights and interests. Now that the legislative framework is finalised and the steps necessary to implement the new land water management systems are complete, resort to these compensation regimes may be expected, particularly if development pressures intensify and increase the potential for land use conflict.

Compensation is payable under the land claim regimes to participants who suffer loss or damages resulting from activities which will affect the way they use their settlement lands or exercise their water rights. The rights protected by these compensation regimes were the result of negotiations at land claim tables.[27] These land claim rights are, of course, constitutionally protected.

These land claim based water compensation regimes are an important element of the Crown's aboriginal rights and natural resources development policy framework. These policies, while generally mutually reinforcing, can at times come into conflict. For example, aboriginal communities in the Mackenzie Valley often suffer from high rates of unemployment and can benefit from economic development based on oil and gas and mining activities, which are encouraged by the Crown. However, these development activities may affect aboriginal rights which depend on use of their water, land and wildlife. The compensation regimes established through the land claims can, therefore, be viewed as a measure through which these conflicts can be resolved and through which the Crown's special obligations to first nations can be reconciled with its encouragement of northern development.

Compensation regimes also provide important signals to decision makers, especially in the context of the economics of natural resource development. They can provide for a fuller accounting for the costs of development and limit the externalization of environmental costs, at least in respect of first nations. These regimes can also reduce resource use conflict. Ultimately, these compensation regimes should also contribute to both efficiency and fairness in the natural resource allocation and development process.

Lessons Learned from Compensation Cases – Outstanding Issues

Because there is no experience with compensation claims under the MVRMA, we have had to examine the experience under the NWTWA and to review and interpret the Gwich'in and Sahtu land claims in order to identify any gaps or policy issues which should be considered to facilitate the efficient working of the water compensation regimes. We have also reviewed the compensation experiences of Yukon Territory Water Board.

The compensation cases to date point to a number of issues which have not been dealt with in either the land claims or the statutory framework. From a legal perspective, some guidance with respect to these issues will be essential for the land and water boards responsible for adjudication of compensation cases. These issues include the following:

Who Bears the Onus in a Compensation Case and What is the Burden of Proof?

The NWTWA is silent on the specific question of the burden of proof. The NWT Water Board has stated in its compensation cases that the civil burden of proof, that is "to a balance of probabilities", is the appropriate standard. It seems reasonable that such a standard would be applied in the context of compensation proceedings..

The question asked above also raises the issue of which party to a compensation proceeding has the onus to convince the decision maker. Generally, in civil proceedings, the onus to prove a claim for compensation would rest on the claimant.

This was the conclusion reached by the NWT Water Board in its compensation cases. I suggest with respect, however, based on the language found in section 14 of the NWTWA that the board was wrong. Subsection 14(4) of the Act begins with the following words: "Where an application for a license is made, the Board shall not issue a licence *unless the applicant satisfies the Board that* ..."(emphasis added). In my view, as a result of this language, the water legislation clearly

allocates the onus of proof to a license applicant. The question which results is whether in the context of an application for water compensation pursuant to a land claim, the onus should also be on the applicant to show that the use will not interfere with first nation water rights, or whether the first nation must prove that it will. There is no statutory guidance on this point and the land claims are silent on it.

The Yukon Territory Water Board disposed of an application for compensation in the Minto case by ruling that it "... was not presented with sufficient information to determine that the operation of the mine would lessen the property value ...". It therefore appears that both water boards have experienced some challenges with respect to the question of the statutory onus of proof.

The questions of onus and burden are of vital importance in the context of applications for compensation by first nation water users. These individuals may lack the technical capacity and resources to advance a convincing case for compensation if they must both bear the onus of proof and must meet the civil burden.

Notice and Standing to Advance a Compensation Claim

In the context of a claim for water compensation, notice is important. Since land and water board responsibilities are primarily directed at the licensing process, a compensation claimant can miss the opportunity to advance a claim if they are not aware that a license application is about to be considered by the board. Both the statutory and land claims water compensation systems depend on the board adjudicating a claim before a license is issued. In the statutory context, there is a deadline after which a claim may not be advanced. The only recourse for a compensation claimant who misses the deadline would be through the courts.

The issue of notice is also important to the license applicant. Since the water compensation regime encourages negotiation, the land and water boards can be expected to insist that negotiations take place before they adjudicate. Thus notice and the timing of the negotiation of a compensation claim could affect water licensing proceedings. Finally, the obvious question of administrative fairness arises when compensation claims are advanced late in a process. In the BHP water licensing hearing, the NWT Water Board dismissed the application of the Lutsel'ke first nation on the basis that they had not provided notice of the claim before the deadline established by the NWTWA.. The issue of notice also figured importantly in the NWT Board's second Taltson hearing.

Causation

Under both the water compensation regimes reviewed above, it should still be necessary for the compensation claimant to prove that the alleged damages and losses are or will be caused by the development activity. Much of the evidence of loss or damage may be within the claimant's unique knowledge. How much information should the respondent company be required to provide? The issue of causation is not dealt with explicitly under either of the regimes.

We should not confuse the need to prove causation with questions of negligence or fault. It is clear that neither negligence or fault need be proven in order for a water compensation claimant to succeed. This is because of the prior allocation roots of the water compensation system. The purpose of this compensation is to protect preexisting users or rights holders. The trigger is the effect on a pre existing water rights holder, not negligence or fault.

Compensation is Paid Prospectively

As has been mentioned, because of the licensing role played by the boards, compensation must be paid prospectively. In other words, if valid a claim is advanced, either a compensation agreement must be negotiated or the land in water board will have to decide whether compensation is payable before the license can be issued.

Compensation payable under these regimes includes both present and future losses thus raising uncertainty problems related to the prediction of future losses. The land claim regimes do not address the issue of remoteness of damages nor do they address the duration of the compensation period. Clearly compensation should not become a form of welfare.

These concerns raise difficult questions of fact. In the north the problems in dealing with them is compounded by the limited data bases available to assist in making scientific predictions. Since water compensation must be paid before a licence is issued, these uncertainties may contribute to the difficulty of adjudicating compensation. Such issues may not appear that important when small claims are involved but they could lead to significant uncertainties in the case of major claims.

What kind of Compensation can be Ordered?

In the context of water compensation, the SFA provides for a flexible approach to determining the form of compensation payable. The land claim specifies that the compensation may be either a cash payment or the replacement or substitution of damaged or lost property or equipment or relocation or transportation of the participant to a different harvesting locale. If cash is paid this may occur as either a lump sum or periodic payment. This sort of flexibility makes good sense in the context of Mackenzie Valley communities.

In the statutory water compensation context, the NWT Water Board ruled in its BHP hearing that compensation had to be determined once and for all at the time of the award and that it had to be paid in cash. With respect, a close reading of the NWTWA appears to provide more flexibility for the shaping of a compensation award than was envisioned by

the Board. The Yukon Territory Water Board has awarded periodic compensation.

Conclusion

Based even on this brief review, it is apparent that there are a number of important procedural and legal elements of these compensation systems which still need to be worked out. The responsibility for developing this framework of course rests primarily with the land and water boards who will adjudicate water compensation claims. The water compensation regimes provide for the negotiation of compensation before an adjudicated outcome may be sought. A systematic and principled approach or policy for resolving compensation issues should be developed by the land and water boards and, to the extent possible, applied consistently to guide this process.

Companies active in the Gwich'in and Sahtu settlement areas need to identify key stakeholders and any water rights and interests potentially affected by their proposed exploration or development activities early in the planning process. A failure to do so could lead to delays in the approvals process, increased costs and unnecessary compensation claims. Companies planning exploration or development in these areas should also be at least generally familiar with the legislative framework and land claim rights granted to the Gwich'in and Sahtu first nations and participants.

While the environmental impact assessment and regulatory processes established by the MVRMA may identify and avoid most instances where compensation issues might arise, it is important for operators in the region to understand and be prepared to deal with these new compensation regimes, if claims arise.

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Notes

1. See, David R. Percy, *The Framework of Water Rights Legislation in Canada* (Calgary: Canadian Institute of Resources Law, 1988). At pp. 51-58 Professor Percy discusses the problems which resulted in the *Northern Inland Waters Act*, R.S.C. 1985, c. N-25 (NIWA) regime because priorities were never set for the classes of water use. As a result, the compensation system in NIWA was not functional.

2. S.C. 1992, c. 39.

3. *Comprehensive Land Claim Agreement Between Her Majesty the Queen in Right of Canada and the Gwich'in as Represented by the Gwich'in Tribal Council* (Ottawa: Indian and Northern Affairs Canada, 1992), referred to below as the Gwich'in land claim, the Gwich'in claim or the GFA.

4. *Comprehensive Land Claim Agreement Between Her Majesty the Queen in Right of Canada and the Dene of Colville Lake, Deline, Fort Good Hope, and Fort Norman and the Metis of Fort Good Hope, Fort Norman and Norman Wells in the Sahtu Region of the Mackenzie Valley as Represented by the Sahtu Tribal Council* (Ottawa: Indian and Northern Affairs Canada, 1993) referred to below as the Sahtu land claim, the Sahtu claim or the SFA.

5. S.C. 1998, c. 25. In force December 22, 1998.

6. In the rest of the Mackenzie Valley this change did not occur until Part 4 of the MVRMA was called into force March 31, 2000.

7. SOR/93-303, 8 June 1993 as amended.

8. The Mackenzie Valley Land and Water Board (MVLWB) operates through regional panels, one each for the Gwich'in and Sahtu settlement areas and a third South Mackenzie panel for the balance of the NWT. The south Mackenzie panel has all the powers of a part 3 board but does not, however, have any authority with respect to land claim based water rights. See section 102(1) of the MVRMA.

9. Section 68 of the MVRMA recognizes the interrelationship between the NWTWA and the new water regime and provides for consultation between the boards and the federal Minister with respect to any amendment to either the NWTWA or to the MVRMA. Section 83 of the MVRMA makes it mandatory for the federal Minister to consult the Gwich'in and Sahtu First Nations with respect to the amendment of the NWTWA or any regulations made under that Act.

10. In the Gwich'in claim these rights are outlined in chapter 19 and in the Sahtu claim they are found in chapter 20. These rights are essentially identical for both claims. Reference to the Sahtu claim for the balance of this article is for convenience only.

11. These are the provisions which are outside the authority of the South Mackenzie panel of the MVLWB which operates in a part of the valley where there are no settled land claims.

12. The regulations authorize water uses within specified limits without the requirement for a licence. Such uses are called "authorized uses".

13. A review of this common law framework is outside the scope of this paper. I will note, however, that it appears that because of the way settlement lands were granted that participants in these claims probably have riparian rights which are then modified by the statutory framework of the NWTWA. Irrespective of the scope of this statutory effect, paragraph 20.1.9(a) of the SFA gives participants "such remedies as if they had riparian rights".

14. See the Federal Court of Appeal's comments on defining significance in *Alberta Wilderness Association* v. *Express Pipeline Ltd.*, [1996] F.C.J. 1016 (C.A.) p. 4 at para. 10.

15. Section 3.1.22.

16. The MVRMA defines of the "Gwich'in First Nation" and the "Sahtu First Nation" to mean the Gwich'in Tribal Council and the Sahtu Secretariat Inc., respectively. These organizations represent land claims beneficiaries collectively. However, the grantees of the rights outlined in Article 20 of the Sahtu land claim are the "participants"a term defined to mean the individuals enrolled in the claim. It seems likely that the rights outlined in s. 73 would apply to participants as well to land claims organizations.

17. This term is defined in s. 51 of the MVRMA to mean lands granted to the Gwich'in and Sahtu First Nations both inside and outside of communities.

18. Similar provisions protecting the integrity of waters on lands granted to land claim beneficiaries are contained in the Nunavut Land Claims Agreement and the Yukon Umbrella Final Agreement.

19. Section 76 of the MVRMA reflects s. 20.1.14 of the Sahtu land claim.

20. Subsection 79(1) of the MVRMA provides for the land and water boards to set a time

frame for the negotiation of compensation in their rules. To date, the boards have not done so.

21. This includes the Inuvialuit Settlement Area.

22. One might question how a land and water board is likely to know about such a project since the outside authority only provides the information after being contacted by the land and water board.

23. *Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon*, May 29, 1993.

24. It is beyond the scope of this article to review these compensation decisions in full. This discussion is simply intended to indicate that territorial water boards have had some limited experience with the adjudication of compensation claims and that some lessons have been learned.

25. S.C. 1992, c. 40. The compensation provisions in paragraphs 14(4)(a) and (b) of that Act are identical to those found in the NWTWA.

26. Although our focus has been the Mackenzie Valley, it is worth noting that in the Inuvialuit Settlement Region (ISR) statutory water rights compensation can be required under the NWTWA. However, the *Inuvialuit Final Agreement* does not grant special water rights to Inuvialuit or call for the establishment of a unique water compensation system in the ISR.

27. The statutory water compensation regime also protects non-aboriginal users but it has been modified and adapted to fit the requirements of the land claim based compensation regime as well.

Recent Developments in Canadian Oil and Gas

*by Nigel Bankes**

Split rights – Gas over bitumen and the associated conservation and compensation issues

Alberta contains significant bitumen resources. In-place resources on Gulf's Surmont leases alone are estimated at 15 billion barrels with somewhere between 5.25 billion and 7.5 billion barrels estimated to be recoverable. In 1996 Gulf applied to the Alberta's conservation Board, (the Alberta Energy and Utilities Board, "AEUB") for an order shutting in gas production from related formations. Following a general inquiry and then a more specific inquiry focussed on Gulf's application (EUB Decision 2000-22), the AEUB granted the bulk of Gulf's application. The Board found that the gas in question had potential to be associated with Gulf's bitumen deposits either through direct vertical continuity or indirectly through lateral continuity of the gas and water zones. This was so notwithstanding the presence of interbedded sands and muds. Reservoir modelling suggested that producing associated gas would likely have a detrimental effect on Gulf's bitumen recovery (using steam assisted gravity drainage (SAGD)) and that the detrimental effect would increase with decreasing gas pressure.

The gas producers subsequently sought to question the validity of the shut-in order by attacking the underlying regulations on which the orders were made. Not surprisingly, the application failed. Justice Hart in *Giant Grosmont Petroleums Ltd. et al.* v. *Alberta Energy and Utilities Board* followed a purposive approach and confirmed that "It is clear from the objects and stated purpose of the legislation [the *Oil and Gas Conservation Act (OGCA)*, the *Oil Sands Conservation Act* and the *Energy Resources Conservation Act*] that prevention of waste and conservation of resources go to the very root of the Board's purpose and existence."

Subsequent to the Board's decision, the Alberta government passed an Order in Council (OC 196/2000) under section 91 of the OGCA requiring the AEUB to convene a hearing to consider whether it is appropriate to develop a compensation scheme for the gas producers. Section 91 is a truly extraordinary section because a Board-proposed scheme, once approved by the Lieutenant Governor in Council, will have the force of statute. The Board held a preliminary hearing (EUB Memorandum of Decision, November 27, 2000) to identify the issues and then Gulf *et al.* commenced proceedings questioning the validity of the Order in Council. The OC requested the AEUB to develop a scheme to provide compensation to those persons who "are injured or suffer loss" as a result of the AEUB's Order. The OC stipulated that any scheme developed by the AEUB should exclude the Crown as either payor or payee. The bitumen owners (Gulf and Petro-Canada) successfully sought judicial review of this stipulation. The Court (*Gulf Canada Resources Ltd.* v. *Alberta*, [2001] AJ 387, ABQB 286) reasoned that section 91 contemplated a division of functions between the AEUB and the LGC. The role of the LGC was to initiate the procedure and to decide whether or not to approve the scheme developed by the AEUB. It was the AEUB's job to design the scheme. Read as a whole, section 91 did "not support the ability of the LGC to predetermine a significant substantive aspect of a compensation scheme." The court also rejected the argument that section 8 of the OGCA afforded the LGC the power to make *any* OC subject to terms and conditions. While this might be true of "an order", the statutory provision that triggered the procedure used the term "direction" and therefore section 8 was not available.

Three comments are in order. First, the court's reasoning on the section 8 argument seems unduly technical. The LGC always acts by way of an OC and whether the OGCA describes the action

as an order or as a direction should not make any difference. Second, (and these two comments pertain to the general issue rather than to the specific matters before the court) the real issue here is whether or not it is appropriate to order compensation to be paid *at all* where a shut-in is ordered for conservation reasons. The substance of that argument has yet to be considered. Third, on the merits (admittedly not before the court), it is hard to imagine why the Crown should pay or receive compensation. Why should the liability of the Crown be engaged by a shut-in ordered by the AEUB? Surely there is no liability on the Crown *qua* proprietor for severing bitumen and gas estates. The only other basis of liability would be on the Crown as regulator for a regulatory taking and that seems inconceivable on these facts.

In another recent Board decision (Goodwell Petroleum Corporation, EUB Decision, 2000-21) the Board ordered shut-in a number of AEC's horizontal bitumen wells on the grounds that they were producing significant volumes of original gas-cap gas that Goodwell argued were owned by it as the owner of the petroleum natural gas rights (i.e the rights other than bitumen). In its decision the Board relied upon numerous statutory provisions for its authority to make the order sought. Perhaps most significantly it confirmed that its conservation authority extended to bitumen wells as well as gas wells (as in *Giant Grosmont*) and held that any production by AEC of gas-cap gas would be a breach of AEC's licence and therefore of section 13 of the OGCA. In so ruling, the Board was evidently drawing a line between the incidental production of gas-cap gas along with bitumen or petroleum (for which there is long-standing high authority in Alberta, at least with respect to petroleum: *Borys* v. *CPR* (1952-53), 7 WWR 546 (JCPC)) and more sustained or high-ratio gas production. The Board also noted that AEC required prior approval for any gas cap production and that where conservation and equity issues between the different split-rights owners were not shown to be properly addressed, the Board could deny or condition gas-cap production resulting in shut in or production constraints. The Board observed that it does not use any prescribed gas-oil ratio (GOR) marker such as the 1800m3/m3 proposed by AEC when deciding whether a producer is producing gas-cap gas. In effect, the Board decision will require a production-sharing agreement between the gas-cap owners and the bitumen producers.

Court offers guidance on exercise of rights of first refusal under operating agreement

The recent judgement of Justice LoVecchio in *Chase Manhattan Bank of Canada* v. *Sunoma Energy Corp.* [2001] AJ 245 establishes the following propositions with respect to the exercise of ROFR rights under the 1974 version of the 1974 CAPL Operating Procedure.

A. A receiver disposing of the entire assets of a joint operator but through a series of piecemeal sales is not entitled to avoid a ROFR obligation by relying on the exemption conferred by cl.2402(c) of CAPL to the effect that "An assignment, sale or disposition made by the assignor of all, or substantially all, or of an undivided interest in all, or substantially all of its petroleum and natural gas rights in the province ... where the joint lands are situated."

B. Neither can a receiver rely upon the exemption conferred by cl.2402(a) which refers to "an assignment made by way of security for the assignor's indebtedness." This exception only applies to the original assignment by way of security and does not apply to any subsequent sale enforcing that security.

C. In the case of a package deal, the offeror owes an implied duty of good faith in allocating a value to the ROFR-encumbered property. The burden lies on the ROFR holder to show that the allocation of value breaches the duty of good faith and does not do so merely by showing: (1) that the receiver merely accepted the allocation of value proposed by the purchaser, or (2) by adducing evidence to the effect that the valuation of the ROFR-encumbered property was inflated. *Semble*, evidence of distortion of asset values amongst different properties within the parcel would be more convincing.

D. A ROFR holder must act promptly and within the terms of the ROFR clause to preserve its entitlements. In particular, where the ROFR holder seeks to contest the validity of the ROFR notice it must do so within the period stipulated by the agreement and should, at a minimum, file a notice of motion within that period.

E. While arbitration may be available to determine value where the offer for the ROFR-encumbered property is in a form which cannot be matched by the ROFR holder, arbitration is not available where there is simply a disagreement as to the cash price allocated to the ROFR-encumbered property which is offered as part of a package deal.

Court favours strict construction of lien legislation; no liens for transportation costs

S supplied fracturing and cementing services to M's multi-well drilling program. M came under the protection of the *Companies' Creditors Arrangement Act*. S filed liens in respect of the services that it had provided. Two of the liens were filed within the time prescribed by the *Builders' Lien Act (BLA)* while the balance could only be justified if the work was undertaken pursuant to a general contract or pursuant to a prevenient arrangement falling short of a contract. Both claims were rejected by Justice LoVecchio in *Schlumberger Holdings (Bermuda) Limited* v. *Merit Energy Ltd.* [2001] ABQB 34. The general contract argument was rejected on the basis that M's call for bids and S's response did not create a binding contract because of an absence of essential terms. Instead, contracting occurred on a well-by-well basis. The prevenient arrangement argument failed because S could not show the thread that linked the supply of goods and services for the successive wells. Finally, while S's two timely liens were valid, the lien claim

should not extend to transportation costs incurred by S in delivering its services. These costs fell outside the terms of section 4 of the *BLA* since such costs could only qualify "for so much of the price of the ... material" and because there was an insufficiently direct connection between transportation and provision of service for these costs to be treated as costs "in respect of an improvement". In reaching these conclusions Justice LoVecchio distinguished earlier lines of authority allowing liens for transportation costs. Justice LoVecchio preferred a strict construction of the *BLA* recognizing that *BLA* liens are created by statute and grant one class of creditors a priority not enjoyed by others.

Overriding royalty agreement does not extend to after-acquired interests in original properties

The Alberta Court of Appeal in *Edbe Consulting Limited* v. *Union Gas Limited*, [2001] ABCA 3 has held that a geological consulting agreement that gave Edbe a GOR in Union's share of production attributable to any property in which Union acquired an interest as a result of a recommendation or reference by Edbe, did not extend to increased interests that Union might have acquired in the same properties after the original agreement was terminated. In so holding the Court reversed the unreported oral judgement at trial of Justice Romaine. The Court, in my view correctly, held that had the parties wished to adopt the interpretation contended for by Edbe, they would have used specific language to achieve that result. Edbe even went so far as to contend that the royalty should attach to any additional interest in the original properties acquired by Union's successors in interest.

As result, the Court of Appeal found it unnecessary to comment on the trial judge's decision to the effect that each failure to meet an obligation to make a royalty payment constitutes a new breach of action. Justice Romaine had held that while Edbe did not bring its action until more than six years (the relevant limitations period for a contractual cause of action in Alberta at the time) after Union had acquired additional interests in the lands, Edbe's delay did not destroy the cause of action but merely limited the period for which Edbe could make a claim.

Undertakings as part of accounting litigation under operating agreement

In *Depar Management Ltd.* v. *Piute Petroleums Ltd.* [2001] ABQB 22 the defendant operator sought a ruling as to whether or not the plaintiff joint operator had fulfilled the terms of certain undertakings made in the course of discovery in a long-standing accounting dispute in relation to an old oil and gas agreement. The undertakings related to the segregation and calculation of cleaning, processing and injection charges. Justice Cairns ruled that the plaintiff had met its obligations under the circumstances. In fulfilling its undertakings the plaintiff could only work within the data provided by the defendant. It was the defendant who was the operator of the property and who should have had access to all the data at a level of detail and segregation or breakout. The plaintiff could not be required to "breakout" that which had not been broken out by the defendant.

More CCAA Litigation: application to terminate stay

W entered into a prepaid gas purchase agreement with Rio Nevada. In return for the prepayment Rio Nevada was to deliver certain daily volumes of gas to W until October 2004. To secure its interest Rio Nevada granted W a first ranking security interest or charge over all of its assets and W was entitled to appoint or apply to the court to appoint, a receiver. Rio Nevada had some difficulty meeting the production requirements of the contract. Claiming a breach of the security arrangements under the contract, W terminated the contract and claimed liquidated damages indicating that it would appoint a receiver in the event that payment of damages was not received within a prescribed time. Prior to that deadline Rio Nevada sought and obtained protection under the *Companies' Creditors Arrangement Act*. The protection included a stay of proceedings order. In *Re Rio Nevada Energy Inc.* [2000] AJ 1596, W brought an application seeking to terminate the stay and to appoint a receiver-manager pursuant to its security. Rio Nevada brought a cross application for an extension.

On the application to terminate a stay the onus is on W. W must show that any plan of re-organization is doomed to failure (i.e., there is no reasonable chance any plan would be accepted). On the application to extend, the stay the onus was on Rio Nevada which must prove under subsection 11(6) of the CCAA that continuation is (1) appropriate, and (2) that it has acted in good faith and proceeded diligently.

The court granted Rio Nevada's application and denied W's application. While the case is undoubtedly of greatest interest to the general bankruptcy bar several points may be of interest to oil and gas lawyers. First, Justice Romaine gave short shrift to W's submissions that there was a risk that its position would become non-secured. This claim was based upon: (1) a supposed over- valuation of RN's reserves prepared *post-CCAA*, (2) interest obligations associated with W's claim for liquidated damages, and (3) continued production of Rio Nevada's assets. Second, Justice Romaine also rejected W's attempts to question the good faith of Rio Nevada on the grounds that it had been misled by Rio Nevada with respect to the status of well remediation plans for the two problem wells. The court commented that this issue had more to do with W's decision to terminate the contract than Rio Nevada's lack of good faith *post* the CCAA order.

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New Research Associate

Robin L. Cowling joined the Institute as a Research Associate in April 2001. She holds a B.Sc. (Hons) in neuroscience from Dalhousie University, LL.B. from University of Calgary, a Master of Arts Politics of Alternative Development Strategies from the Institute of Social Studies - The Hague and an LL.M. from Dalhousie University. Ms. Cowling is a member of the Nova Scotia Barristers' Society (Canadian Bar Association, Environmental Law Sub-Section), and the American Bar Association (Section of Environment, Energy and Resources).

Ms. Cowling's area of research is primarily oil and gas related.

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