

The Newsletter of the Canadian Institute of International Law

# Legal Regulation of Subsoil Use and Environmental Protection in the Khanti-Mansiysk Autonomous Okrug of the Russian Federation

## Introduction

by Janet Keeping\*

Khanty-Mansiysk Autonomous Okrug is one of the constituent entities of the Russian Federation, and at the same time is a part of the biggest region in Russia, which is the Tyumen region (or "oblast").

Formally known as the Khanty-Mansiysk Autonomous Okrug, the region is named after two groups of aboriginal peoples who occupied the region for many centuries. While the Mansi are largely extinct, Khanti survive in significant numbers in the region, and many Khanti still rely to a large extent on the surrounding lands and rivers for food and other necessities of life.<sup>1</sup>

Oil in enormous quantities was first discovered in Khanty-Mansiysk in the 1960s.<sup>2</sup> Huge volumes of oil have since been produced from the okrug.

Although other regions of Russia are growing in importance as oil producers - for example, the Timan-Pechora basin, not in Siberia but in European Russia, the various projects offshore Sakhalin Island in the Russian Far East and the Caspian Sea - Khanty-Mansiysk still accounts for about one half of Russia's oil production.

Since the Russian Federation (or, simply, Russia) emerged as a separate country after the dissolution of the Soviet Union, one of the most pressing tasks for law and policy makers has been to fashion a legal regime which can reconcile the needs of an increasingly market-driven oil and gas industry, the needs of the State for revenues from oil export and the needs of the public for sustainable development. At both the central and regional levels of government, and to a lesser extent at the municipal level too, legislators have had to struggle with legal reform in the face of a rapidly changing, and still somewhat contradictory, petroleum

sector. Nowhere in Russia has this task been more important, or more complicated, than in Khanty-Mansiysk.

CIRL is very pleased to be able to publish the following article on the law applicable to mineral development and environmental protection in the Khanty-Mansiysk okrug. The article is written by two people from Tyumen State University - Gennady Nikolaevich Chebotarev, Professor, and Dean of the Institute of State and Law, and Elena Fedorovna Gladun, Research Assistant for the Institute. Tyumen is the largest city in the Tyumen oblast, of which Khanty-Mansiysk okrug is, as already noted above, a constitutive part, and is its administrative center.

Since 1994, when Janet Keeping lectured at Tyumen State University for a month, CIRL has had an on-going relationship with the Institute of State and Law, and its predecessor, the University's Faculty of Law. CIRL is currently working with staff of the Institute on delivery of short courses on natural resources law and policy issues, which have been designed to satisfy needs for information on issues of current importance to those working the Russian energy sector. This project - "Legal and Management Issues in Energy" - is funded by the Canadian International Development Agency (CIDA) and man-

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aged jointly by CIRL and the Southern Alberta Institute of Technology (SAIT). For further information on the project, including the schedule of courses for November and December of this year, consult <www.sait.ab.ca/russia>.

The Institute of State and Law of Tyumen State University and CIRL intend to collaborate on research into questions of natural resources law, especially mineral development law (called the "law on the subsoil" in Russia) and related topics, such as environmental law and the law governing the protection of indigenous peoples' interests in resource development. A joint publication has already appeared in Russia<sup>3</sup> and readers of *Resources* will be apprised of further, collaborative projects as they evolve, both with Tyumen State University staff and researchers working at other Russian universities which have departments, faculties or institutes devoted to natural resources law.

This article was written in Russian, translated into English by Dr. Rolf Hellebust, of the University of Calgary's Department of Germanic, Slavic and East Asian Studies, and edited by Janet Keeping. The Russian text is available on CIRL's website at <www.cirl.ca>.

*Janet Keeping is a Research Associate with, and Director of Russian Programmes for, the Canadian Institute of Resources Law.*

#### Notes:

1. For the results of recent research on Khanty lifestyle and culture in western Siberia see *Essays on Khanty Traditional Land Use and History (Materials for an Atlas)* (Ekaterinburg, Russia: Thesis Publishers, 1999). Janet Keeping can be contacted for some English language publications on the impact of oil development in the region on the Khanty.

2. For a brief history of the petroleum sector during the Soviet period, see Anthony E. Reinsch, Igor Lavrovsky and Jennifer I. Considine, *Oil in the Former Soviet Union* (Calgary: Canadian Energy Research Institute, 1992).

3. An article entitled "Legislative Delimitation of Powers in the Area of Subsoil Use and Environmental Protection in the Khanti-Mansiysk Autonomous Okrug of the Russian Federation and the Province of Alberta, Canada" was published in Tyumen State University's "Scientific Notes" this spring. The authors were: Gennady Nikolaevich Chebotarev, Elena Fedorovna Gladun and Janet Keeping.

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## Réglementation juridique de l'utilisation du sous-sol et protection de l'environnement dans l'Okrug autonome de Khanty-Mansiysk de la Fédération russe

### Introduction

*par Janet Keeping*

L'Okrug autonome de Khanty-Mansiysk est l'une des entités constituantes de la Fédération russe, et fait également partie de la plus grande région de la Russie, à savoir la région (ou "oblast") de Tyumen.

Connue sous le nom de Okrug autonome de Khanty-Mansiysk, cette région tire son nom des deux groupes de peuples autochtones qui l'occupent depuis des siècles. Bien que les Mansi aient pour la plupart disparu, les Khanti survivent en grand nombre dans la région et beaucoup d'entre eux dépendent encore des terres et rivières avoisin-

nantes pour leur nourriture et leurs autres besoins vitaux.<sup>1</sup>

D'énormes quantités de pétrole ont été découvertes et exploitées dans la région de Khanty-Mansiysk depuis les années 1960.<sup>2</sup> Bien que d'autres régions de la Russie acquièrent de plus en plus d'importance comme productrices de pétrole – notamment le bassin de Timan-Pechora situé non pas en Sibérie mais en Russie européenne, les divers projets d'exploitation au large de l'île Sakhalin à l'extrême-orient de la Russie et la mer Caspienne – Khanty-Mansiysk produit encore environ la moitié du pétrole de la Russie.

Depuis que la Fédération russe (ou tout simplement la Russie) est devenue un

pays distinct après la dissolution de l'Union soviétique, l'une des tâches les plus urgentes des législateurs et des politiciens a été d'instaurer un régime juridique qui puisse concilier à la fois les besoins d'une industrie des hydrocarbures de plus en plus dépendante des marchés, les besoins de l'État en revenus d'exportation du pétrole et les besoins de la population en développement durable. Au niveau des gouvernements central et régional, et à un moindre degré municipal, les législateurs ont dû élaborer des réformes juridiques tout en étant confrontés à un secteur énergétique soumis à des changements rapides et contradictoires. En Russie, cette tâche n'a été nulle part plus urgente et plus complexe que dans le Khanty-Mansiysk.

CIRL est heureux de publier cet article sur la législation afférente au développement énergétique et à la protection de l'environnement dans l'okrug de Khanty-Mansiysk. L'article est écrit par deux auteurs de l'Université de l'État de Tyumen: Gennady Nikolaevich Chebotarev, professeur et doyen de l'Institut de l'État et du droit, et Elena Fedorovna Gladun, associée de recherche de cet Institut. Tyumen est la ville la plus importante de l'oblast de Tyumen, dont l'okrug de Khanty-Mansiysk constitue le centre administratif.

Janet Keeping a enseigné pendant un mois à l'Université de l'État de Tyumen en 1994. Depuis lors, CIRL a maintenu des relations avec l'Institut de l'État et du droit et son prédécesseur, la Faculté de droit de cette Université. CIRL travaille actuellement avec le personnel de l'Institut à organiser des cours de courte durée en droit et politique des ressources naturelles. Ces cours ont été conçus pour permettre aux personnes qui travaillent dans le secteur énergétique en Russie d'être informées sur les questions les plus courantes dans leur secteur. Ce projet, intitulé "Questions juridiques et de gestion en matière d'énergie", est financé par l'Agence canadienne de développement international (ACDI) et géré conjointement par CIRL et le Southern Alberta Institute of Technology (SAIT). Pour de plus

amples renseignements sur ce projet, y compris le programme des cours pour les mois de novembre et décembre 2001, vous pouvez consulter le site <[www.sait.ab.ca/russia](http://www.sait.ab.ca/russia)>.

L'Institut de l'État et du droit de l'Université de l'État de Tyumen et CIRL ont l'intention d'entreprendre conjointement des projets de recherche sur les questions afférentes au droit des ressources naturelles, notamment le droit du développement des ressources minérales (intitulé "droit du sous-sol" en Russie) ainsi que d'autres sujets, par exemple le droit de l'environnement et le droit relatif à la protection des intérêts des peuples autochtones en matière de développement des ressources. Une publication conjointe est déjà parue en Russie<sup>3</sup> et les lecteurs de Resources seront informés d'autres projets communs, aussi bien avec l'Université de l'État de Tyumen qu'avec des chercheurs d'autres universités russes dont les départements, facultés ou instituts se spécialisent en droit des ressources naturelles.

Cet article a été écrit en russe, traduit en anglais par le Docteur Rolf Helleburst du Department of Germanic, Slavic and East Asian Studies de l'Université de Calgary, et édité par Janet Keeping. Le texte russe est disponible sur le site de CIRL à <[www.cirl.ca](http://www.cirl.ca)>.

Janet Keeping est agrégée de recherche et Directrice des programmes russes \_ l'Institut canadien du droit des ressources.

#### Notes:

1. Sur les conclusions des recherches récentes sur le mode de vie et la culture des Khanti en Russie occidentale, voir *Essays on Khanty Traditional Land Use and History (Materials for an Atlas)*. Vous pouvez contacter Janet Keeping pour obtenir des publications en anglais sur l'impact du développement pétrolier sur les Khanti.

2. Pour une histoire condensée du secteur pétrolier pendant la période soviétique, voir Anthony E. Reinsch, Igor Lavrovsky et Jennifer I. Considine, *Oil in the Former Soviet Union* (Calgary, Alberta, Canada: Canadian Energy Research Institute, 1992).

3. Un article intitulé "Legislative Delimitation of Powers in the Area of Subsoil Use and Environmental Protection in the Khanti-Mansiysk Autonomous Okrug of the Russian Federation and the Province of Alberta, Canada" a été publié au printemps dernier dans les "Scientific Notes" de l'Université de l'État de Tyumen. Les auteurs sont: Gennady Nikolaevich Chebotarev, Elena Fedorovna Gladun et Janet Keeping.

# Legal Regulation of Subsoil Use and Environmental Protection in the Khanti-Mansiisk Autonomous Okrug of the Russian Federation

by Gennady Nikolaevich Chebotarev, and Elena Fedorovna Gladun\*

The issue of the legal regulation of subsoil use can be considered one of the most serious jurisprudential problems of the Russian Federation. Firstly, questions of subsoil use are insufficiently clearly regulated in the legislation. Secondly, in the process of subsoil use there arise a multitude of ecological problems. Particularly acute in Western Siberia and several other regions is the problem of soil pollution by oil and other petroleum products. A large number of violations involving soil pollution occur in the Khanti-Mansiisk Autonomous Okrug.

Russian environmental legislation underwent a long and complicated developmental process in order to become the independent and quite significant body of legislation that it is now. However, there remain at present a series of problems that demand solutions. The legal basis for subsoil-use regulation and environmental protection is characterized by the following fundamental inadequacies:

- inconsistencies among normative legal acts on the federal and regional levels;
- insufficiently clear delimitation of the powers of the Russian Federation and its subjects<sup>1</sup> in the sphere of subsoil use and environmental protection;
- absence of proper coordination among monitoring agencies in the sphere of subsoil use and environmental protection, and insufficiently clear delimitation of their functions;
- absence of legislative consolidation of the forms of participation of local

government agencies, public organizations and private citizens in monitoring natural resource use.

In the Russian Federation issues of subsoil use, in particular, those involving oil and gas use, are under the authority of the federal, regional, and municipal governments. According to the Constitution of the Russian Federation, the jurisdiction of the Russian Federation [Ed. – i.e., the central government] includes federal programs and the determination of basic federal policy regarding the ecological development of the Russian Federation. Issues involving the possession, use, and disposal of subsoil and environmental protection and safety fall under the joint jurisdiction of the Russian Federation and its subjects. Subsoil and its component, commercially significant minerals and energy and other resources on the territory of subjects of the Russian Federation constitute State property.<sup>2</sup>

It follows from the above description of the division of powers in the Russian Constitution that, the legal regulation of relations in the area of subsoil use and the management of subsoil reserves on the territory of the Khanti-Mansiisk Autonomous Okrug falls under the joint jurisdiction of the Russian Federation and the Autonomous Okrug. State regulation of subsoil use relations on the territory of the Khanti-Mansiisk Autonomous Okrug is implemented by government agencies of the Russian Federation, government and administrative agencies of the Autonomous Okrug, federal agencies for administration of state subsoil reserves, the mining inspectorate, and state geological and environmental monitoring (through their territorial branches), and also okrug state administrative agencies created on the basis of decisions of government agencies of

the Autonomous Okrug or joint decisions with federal state administrative agencies.

Lands from the federal land reserve are granted for subsoil use by decision of the Government of the Russian Federation, or on its behalf by The Committee for Land Resources and Land-Tenure Regulations in the Khanti-Mansiisk Autonomous Okrug. Land parcels under the jurisdiction of the Autonomous Okrug are granted to subsoil users by decision of government agencies of the Autonomous Okrug. Municipal lands are granted to subsoil users by the decision of local government agencies. Land parcels under state or municipal ownership that are located on known reserves of commercial minerals may be transferred to legal or natural persons only on the condition of their immediate exploitation.

Subsoil use in the Khanti-Mansiisk Autonomous Okrug is regulated by Law No. 2395-1 of the Russian Federation of February 21, 1992 (enactment of March 3, 1995) On the Subsoil, and by the Law of the Khanti-Mansiisk Autonomous Okrug of April 18, 1996, On Subsoil Use.<sup>3</sup> The jurisdiction of government agencies of the Autonomous Okrug in the area of subsoil use includes regulation of subsoil use relations on the territory of the Autonomous Okrug, elaboration and adoption of laws of the Autonomous Okrug and other normative acts regarding subsoil use in conformity with federal legislation, and defence of the rights and interests of "small-numbered"<sup>4</sup> indigenous peoples of the North in the process of geological surveying and exploitation of commercial mineral deposits on their ancestral hunting grounds.<sup>5</sup> Government agencies of the Okrug engage in state monitoring of the geological study, conser-

vation, and efficient use of subsoil on the territory of the Autonomous Okrug.

Local government agencies engage in regulation of subsoil relations within the limits of the authority granted them by the prevailing legislation of the Russian Federation and the Autonomous Okrug.

The jurisdiction of local government agencies in the sphere of the regulation of subsoil use includes:

- participation in agreements on terms for granting subsoil use, on issues related to the socio-economic and ecological interests of inhabitants of the administrative territory, and also on terms for the allotment of land parcels;
- preparation of proposals, for the territorial agencies responsible for state subsoil reserves and government agencies of the Autonomous Okrug, regarding geological study of the subsoil supported by deductions for replenishment of the mineral resource base with the aim of developing local resources of commonly-available commercial minerals [Ed. – such as, sand or gravel];
- preparation of proposals and signing of contracts regarding protection of the socio-economic and ecological interests of inhabitants of the administrative territory in cases provided for by laws and other normative acts of the Khanti-Mansiisk Autonomous Okrug, and by the terms of tenders (auctions) for subsoil use rights;
- development of the mineral resource base on behalf of local industrial enterprises;
- granting of permits for the development of deposits of commonly-available commercial minerals, and also for the construction of underground facilities of local significance;

- monitoring of subsoil use and conservation during recovery of commonly-available commercial minerals and during construction of underground facilities of local significance that are unrelated to recovery of those minerals;
- application for restrictions on the use of subsoil parcels in or around populated areas, on sites involved in industry, transport and communications, and also within the borders of the ancestral hunting grounds of the small-numbered indigenous peoples of the North;
- participation in monitoring the adherence of subsoil users to the norms and standards for conservation of subsoil and natural resources, and also measures for the restoration of lands allotted for subsoil use; and participation in the negotiation of terms for subsoil use on issues involving the historical, cultural, ecological, and socio-economic interests of inhabitants of the Autonomous Okrug.<sup>6</sup>

One of the most important tasks of the regional law On Subsoil Use is the establishment of relations directed toward efficient subsoil use, the observance of norms for the conservation of nature and environmental safety, restoration of the natural equilibrium of the ecosystem, environmental monitoring, and harmonization of subsoil use with the preservation of the traditional way of life of the small-numbered indigenous peoples of the North.<sup>7</sup> Therefore, the legislative regulation of subsoil use relations devotes considerable attention to these provisions. The activities of both legal and natural persons in subsoil development on the territory of the Autonomous Okrug may be implemented on the basis of production-sharing agreements concluded in the name of the Russian Federation and of investors, and are also regulated by federal laws and other normative acts of the Russian Federation, and by normative acts of the Autonomous Okrug, as outlined above.

A production-sharing agreement must satisfy requirements for the efficient use of natural resources and the protection of subsoil and the environment, as established by legislation. It must take account of the interests of the Autonomous Okrug and also ensure the protection of the original habitat and traditional way of life of small-numbered indigenous peoples of the North, on the territory of whose ancestral hunting grounds subsoil use is being contemplated.

The terms of the draft production-sharing agreement must stipulate the level of pollution expected within the boundaries of the licensed subsoil parcel, and also the investor's obligations for the safe completion of all work under the agreement in compliance with the prevailing rules, norms, and requirements of environmental and other federal legislation and the legislation of the Autonomous Okrug, and also for obtaining the necessary state permits (licenses) for the types of work in question. The investor is obliged to conduct environmental monitoring and to provide the data so obtained to state environmental monitoring agencies, government agencies of the Autonomous Okrug, and also to local government agencies of municipalities of the Autonomous Okrug. The draft agreement must stipulate the obligations of the investor(s) to protect the environment and to comply with the provisions of federal and okrug resource and environmental legislation.<sup>8</sup>

In the Khanti-Mansiisk Autonomous Okrug, environmental violations in the area of subsoil conservation include commencing petroleum operations without mandatory insurance against the risk of damage to the environment, the selective exploitation of rich areas of deposits leading to unjustified losses of the remaining commercial mineral reserves and deterioration of the deposits, conducting petroleum operations in violation of the technical plan for construction and the development of hydrocarbon deposits, unsanctioned flaring of accompanying gas, the

impoverishment of oil-bearing formations, and several others.<sup>9</sup> For each type of violation, the law of the Khanti-Mansiisk Autonomous Okrug provides for an administrative [Ed. – as opposed to criminal] liability.

Activity connected with the use of subsoil and natural resources on the territory of the Autonomous Okrug and resulting in violation of established ecological norms for effects on the natural environment may either be prohibited or suspended according to the time-frames, procedures and grounds stipulated by federal legislation and by the legislation of the Autonomous Okrug.

Under the law of the Khanti-Mansiisk Autonomous Okrug On Subsoil Use, exploitation of subsoil parcels within the boundaries of ancestral hunting grounds for the purpose of subsoil use is carried out on the basis of a contract (agreement) between the subsoil user and the possessor of the ancestral hunting ground. The contract (agreement) for the exploitation of subsoil parcels within the boundaries of ancestral hunting grounds must stipulate the purposes for which the subsoil user is exploiting the subsoil parcels, the duration of exploitation, the location (boundaries) of industrial sites and infrastructure on the territory of the ancestral hunting ground, and the legal regime under which the exploitation is to be carried out. The contract (agreement) may set the amount of compensation for restrictions on the traditional occupations of the indigenous population resulting from subsoil use within the boundaries of ancestral hunting grounds, as well as other conditions at the discretion of the parties involved.

The contract (agreement) must be registered with local government agencies in the area of the ancestral hunting ground (or community) within which the land parcel has been granted for subsoil use. Allotment of a land parcel for subsoil use on the territory of an ancestral hunting ground is based on the decision of the executive authority of the Autonomous Okrug and of local

government agencies, upon agreement with the possessors of the ancestral hunting grounds (or community).

The law also provides compensation for damage caused to the possessor of an ancestral hunting ground in connection with subsoil use. The amount of damage is determined by agencies for the administration of land resources and by other state administrative agencies of the Autonomous Okrug with the appropriate jurisdiction, and is set out in an assessment of damages signed by a representative of the local government agency (the state executive authority) of the Autonomous Okrug, the possessor of the ancestral hunting ground, and the subsoil user.

The procedure for determining economic damage caused to ancestral hunting grounds in the process of subsoil use is established by federal normative acts and normative acts of the Autonomous Okrug.

Laws and normative acts of the Autonomous Okrug may affirm the exceptional characteristics of land parcels within the boundaries of ancestral hunting grounds (communities) and stipulate a special regime for subsoil use within the boundaries of the ancestral hunting grounds, to take into consideration the traditional occupations of small-numbered indigenous peoples of the North and the ecological condition of the territory of the ancestral hunting grounds.<sup>10</sup>

The defence of the rights and interests of small-numbered indigenous peoples in the implementation of subsoil relations is one of the most serious problems of the Khanti-Mansiisk Autonomous Okrug. The particular reason for this is that there exists no clear legislative consolidation of the powers of federal government agencies and okrug government agencies with regard to this issue. Under the Constitution of the Russian Federation, the use of natural resources, environmental protection, and the ensuring of ecological safety, as well as the protection of

the original places of habitation of ethnic communities, are designated as areas for joint jurisdiction of the Russian Federation and the Khanti-Mansiisk Autonomous Okrug.<sup>11</sup> At the same time, under the legislation of the Autonomous Okrug, protection of the rights and interests of small-numbered indigenous peoples of the North during the exploitation of commercial mineral deposits within the borders of ancestral hunting grounds comes under the jurisdiction of government agencies of the Autonomous Okrug. As a result of the obvious inconsistency between federal legislation and the legislation of the Khanti-Mansiisk Autonomous Okrug on this issue, protection of the interests of the local indigenous population in the process of subsoil use is realized in a very ineffective manner.

The institutional changes affecting the oil and gas industry, the necessity for improvements in environmental and subsoil legislation, the use of economic instruments – all these are becoming more and more important. In the interest of creating an effective mechanism for the legal regulation of social relations in the aforementioned spheres of activity, it is useful to draw on the experience of the legal regulation of these relations in Canada, which has much in common with Russia in the area of subsoil use.

In both Canada and Russia environmental legislation is enacted on two levels – in Russia, those of the federation and its subjects, in Canada, the federal and provincial. Very effective, in our opinion, is the establishment by Canadian governments of, on the one hand, criminal liability for activity that harms public health, and on the other, financial regulation in the form of incentives and taxes. The legislation of the Khanti-Mansiisk Autonomous Okrug provides only for administrative liability, which results in numerous environmental violations. Therefore, in our opinion, it is necessary to formulate a more effective structure for the state administration of environmental protection in Russia, and to create effica-

scious economic and financial mechanisms to encourage efficient use of subsoil.

Finally, Canada and the Province of Alberta, in particular, are notable for their especially effective protection of local indigenous populations in the subsoil use process, since, in the first place, this issue is addressed by both levels of government (between which the division of powers is clearer than between the Federation and subjects in Russia), and in the second place, it involves the more active participation of the indigenous people themselves, than in Russia. In Russian legislation and the legislation of the Khanti-Mansiisk Autonomous Okrug there exists, as already noted, an inconsistency on this issue; i.e., it is very important either to establish a well-grounded delimitation of powers among federal administrative agencies, administrative agencies of subjects of the Russian Federation, and local government agencies – or to designate the protection during subsoil use of territories inhabited by small-numbered indigenous peoples as the responsibility of one particular level of government.

Among the steps that should be taken in this direction are the adoption of laws by the Khanti-Mansiisk Autonomous Okrug to regulate issues of subsoil use with the participation of native peoples, introduction of a financial mechanism to support their standard of living, establishment of state environmental monitoring on ethnic territories, and improvement of the system of contracts and cooperation with the indigenous population.

In our opinion, implementation of these measures will help in improving the legislative regulation of subsoil use, in environmental protection, and in creating a more precise delimitation of the authority of government agencies of the Russian Federation, its subjects, and local government agencies. However, implementation of the aforementioned changes will require serious preparatory work, a more detailed

study of the Canadian experience, and identification of the most expedient means for borrowing from it. At present, questions of subsoil use and the environment are of worldwide concern, and these issues will become even more urgent in the new millennium. We must strive to bring together our knowledge and experience, our errors and accomplishments, in order to work together on this very important problem. This is an immense task, which demands the efforts of many people in various countries. At the present time Russian and Canadian scholars, jurists, legislators, and other specialists are successfully carrying out joint work on many important problems related to the use of natural resources and protection of the environment. We hope that this publication, as well as the series of publications and investigations that we are planning for the near future, will serve as our contribution to solving current problems of subsoil use in Russia and Canada. Furthermore, we would like to continue our mutual study of legal practice, and the collaboration of the Tyumen Oblast with the Province of Alberta, on all the pressing issues that have been listed here.

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#### Notes:

1. Ed. – The "subjects" of the Russian Federation are the political subdivisions of the country. While they do not have the same status, vis a vis the central government, as do the Canadian provinces or territories (they might be thought of as falling somewhere in between the two Canadian categories), for the purposes of the present discussion, they may be considered as loosely analogous.

2. Law No. 2395-1 of the Russian Federation of February 21, 1992 (as amended by the enactment of March 3 1995) On the Subsoil. [Ed. – To say that something is State property is roughly equivalent to saying that it is publicly owned. The term itself leaves undefined to which level of government the resources might be thought to belong. The

assumption usually made is that State property is property of the Russian Federation, but this is not a proposition that is universally accepted in Russia.]

3. Law of the Khanti-Mansiisk Autonomous Okrug of April 9, 1996 On Subsoil Use, Article 97.

4. "Small-numbered" indigenous peoples means those groups of indigenous peoples whose population is low in number.

5. Law of the Khanti-Mansiisk Autonomous Okrug of April 9, 1996 On Subsoil Use, Article 13.

6. Law of the Khanti-Mansiisk Autonomous Okrug of April 9, 1996, On Subsoil Use, Article 15.

7. Law of the Khanti-Mansiisk Autonomous Okrug of April 9, 1996 On Subsoil Use.

8. Law of the Khanti-Mansiisk Autonomous Okrug No. 26-oz of 31.08.96 On Participation of the Khanti-Mansiisk Autonomous Okrug in Production-Sharing Agreements for Prospecting, Exploration, and Recovery of Raw Minerals on the Territory of the Autonomous Okrug (with amendments and supplemented by the Law of the Khanti-Mansiisk Autonomous Okrug No. 54-oz of June 25, 1998 and the Law of the Khanti-Mansiisk Autonomous Okrug No. 69-oz of November 9, 1999), Article 11.

9. Law of the Khanti-Mansiisk Autonomous Okrug of January 23, 1998 On Protection of the Natural Environment and the Environmental Protection of the Population of the Autonomous Okrug, Article 60.

10. Law of the Khanti-Mansiisk Autonomous Okrug of April 9, 1996 On Subsoil Use, Article 104.

11. See Article 72 of the Constitution of the Russian Federation.

# Recent Developments in Canadian Oil and Gas Law

by Nigel Bankes\*

## Legal relationship between gas aggregators and producers: imaginative arguments still intact

There would "most certainly", as Justice Clark tells us in *ProGas Limited v. AEC West Limited*, [2001] ABQB 549 (for a decision on an earlier motion in the same matter see [1999] A.J. 191), "be fundamental problems" if a producer within an aggregator system who unlawfully reduces its deliveries to the aggregator were able to avoid liability to both: (1) the aggregator with whom it had a contractual relationship (on the grounds that the real losses were suffered by fellow producers within the aggregation pool), and (2) fellow producers (on the grounds of an absence of privity).

In this preliminary ruling on cross applications Justice Clark accepted that the unlawfulness of AEC's actions in unilaterally reducing deliveries should be determined as a preliminary matter. Clark rejected AEC's attempts to obtain preliminary judgement against both ProGas as the aggregator and against Amoco who was bringing a representative action on behalf of similarly affected producers within the aggregation pool.

As to ProGas, Justice Clark summarily rejected AEC's argument to the effect that ProGas's claim should be struck because ProGas suffered no loss. Clark observed that if a breach were proven ProGas was entitled to be put in the position that it would have been in had the contract been performed and it mattered not that its other contractual arrangements might ultimately have allowed ProGas to avoid an actual loss. Clark also accepted that there was possible merit in ProGas's agency argument (the producers within the group contemplated that, to the extent that their interest could be adversely affected by a breach of contract by another

producer, ProGas would have the authority needed to enforce those obligations and recover compensation on their behalf) but thought that a trust argument was untenable for there was no intention to create a trust as between ProGas and its producers.

As to Amoco, Justice Clark accepted that a triable issue existed as to: (1) an implied contractual obligation as between producers within an aggregation arrangement based, inter alia, upon the House of Lords decision in *Clarke v. Dunraven*, [1897] A.C. 59, (2) a community of interest argument based upon restrictive covenants in building schemes and the extension of this line of cases to tenants with no-competition covenants in shopping malls, and (3) a possible unjust enrichment argument. For the latter argument it matters not that he alleged enrichment flowing to AEC did not come from Amoco and its fellow producers.

While all of the above represents nothing more than Clark's decision on preliminary motions, each of which could be reversed at trial, it is fair to say that Justice Clark expressed himself quite trenchantly on some of these matters and offered useful supporting reasons for his conclusions.

## Court of Appeal confirms the EUB's jurisdiction to make regulations to shut-in gas over bitumen production

We are all familiar with the idea that, in division of powers cases, the characterization of the matter of the legislation is all important and will usually determine the outcome of the litigation. The Court of Appeal's decision in *Giant Grosmont Petroleum Ltd. v. Gulf Canada Resources Ltd.*, [2001] ABCA 174 affirming Justice Hart's unreported decision at trial (discussed in *Resources* #73, Winter 2001, at 9) shows that the concept may be equally applicable when considering the validity of a set of regulations as a matter of administrative

law. For the majority, the impugned regulations were concerned with conservation and waste but to Justice Conrad in dissent the subject matter of the regulations was a decision by the Board to establish a priority for one energy resource (bitumen) over another (natural gas), a decision which, in her view, had been retained by the legislature and not delegated to the Board.

The majority's interpretation of the Board's power is purposive, robust and non-technical. The majority admitted: (1) that the various provincial energy statutes did not accord the Board the express power to shut in the concurrent production of natural gas and bitumen, (2) that such an express power had in fact been repealed when the oil sands legislation was first introduced, and (3) that such a power had been expressly retained with respect to the concurrent production of natural gas from an oil reservoir. But, undeterred, the majority still concluded that all the provincial energy statutes needed to be interpreted together and that the concurrent management of all energy resources was necessarily implied. This allowed the majority to affirm that the power to regulate waste necessarily included the power to regulate concurrent production. Justice Conrad clearly found the above three arguments much more persuasive and she was of course helped in this conclusion by her characterization of the legislation as being concerned with priority rather than waste. I am unpersuaded by Justice Conrad's conclusion to the effect that the power to regulate concurrent production is not a necessary implication of the power to prevent waste and to require conservation. Her rejection of this fundamental point seems to ignore the history of oil and gas conservation in Alberta as chronicled in David Breen's admirable book, *Alberta's Petroleum Industry and the Conservation Board*.

There was one matter on which the majority and the dissent agreed. Both



accepted that the standard of review with respect to the validity of regulations is that of correctness. The power to enact regulations does not engage the expertise of the Board and therefore deference is not required.

The decision illustrates the risks associated with dealing with different resources by way of discrete legislation. It is ironic that while the legislature has seen fit to deal with the problem of bifurcated jurisdiction by according to the EUB the powers of the former ERCB and PUB, it has dealt less effectively with the problems associated with legislation developed for particular and different hydrocarbons.

### **Chevron cannot re-make its bed**

*Chevron Canada Resources v. Canada (Executive Director of Indian Oil and Gas)*, [2001] ABQB 544 a decision of Justice Romaine handed down on June 27, 2001 is the latest round in ongoing litigation involving Chevron and the Samson, Ermineskin and Lois Bull and Montana Bands (for earlier litigation see (1998), 239 A.R. 138 (Q.B.)). Readers will recall that Chevron filed a claim against the Crown and the Bands as co-defendants claiming against them, jointly and severally, a royalty overpayment and a resulting unjust enrichment. Some of the bands responded by way of counterclaim and there is a proliferation of third party claims. In the present motion Chevron sought to simplify matters: (1) by seeking an order for a summary trial of its claim against the Crown, and (2) by seeking to strike the third party notice issued by the Crown to the Bands. Justice Romaine rejected both applications. The first application was rejected on the grounds that the claims of the parties were so intertwined that they needed to be heard and disposed of together. Chevron could not respond by arguing that it could have elected to bring separate actions against the parties individually. It chose not to do so and must live with the consequences of suing the parties jointly and severally. The second application was rejected on the

grounds that Chevron could not establish that the third party notice was based on facts which, if proven, would give a complete defence to the main action. That was not the case here and, in particular, Chevron could not rely upon Rule 43 which allows a trustee to be sued without joining the beneficiaries, because Chevron had chosen to sue the Crown and the bands (as trustee and beneficiary respectively) jointly and severally.

### **Assignee of lessor's interest in a surface lease must register**

A purchaser of a surface title is entitled to insist that the surface rights lessee make payments to it rather than to the assignee of the lessor's interest in the lease where the assignee has failed to caveat its interest. So held Master Quinn in *Strange v. Binq Industries Inc.*, [2001] ABQB 477. Master Quinn allowed Binq's application for summary dismissal of Strange's statement of claim relying on the Court of Appeal's decision in *Holt Renfrew*, [1982] 4 W.W.R. 481 (Alta. C.A.) and ss. 66 and 195 of the *Land Titles Act*. Quinn's reasoning would have allowed him to hold that Binq was not bound by the surface lease at all since Binq, the purchaser, took title to the lands having already taken steps to lapse the caveat protecting the lease which had been filed by the current lessee's predecessor in title. Evidently however in this case Binq wanted to affirm the lease for the purposes of receiving the lease rental. Master Quinn also held that any tortious claim that Strange might make based upon the tort of inducing breach of contract would also fail on the grounds that such a claim would be inconsistent with the LTA. This is a more controversial claim.

### **Top leases no longer subject to the rule against perpetuities in Saskatchewan**

Top leases are no longer subject to the rule against perpetuities in Saskatchewan or at least so held a majority of the Court of Appeal in *Scur-*

*ry Rainbow Oil (Sask) Ltd. and Tarragon Oil and Gas Limited v. Taylor and Maxx Petroleum Ltd.*, [2001] S.K.C.A. 85, per Tallis J.A., Sherstobitoff J.A. concurring and Jackson J.A. dissenting. The trial judgment (1998), 170 Sask. R. 222 is discussed in *Resources #64*, Fall 1998, at 7. Tarragon was the successor in interest to an old 99-year top lease granted by Taylor's father. Maxx, having at one time been interested in farming-in on Tarragon's property, formed the conclusion, after reviewing Tarragon's title files, that the top lease was void and therefore abandoned the farm-in and took its own lease from Taylor. The majority, on the assumption that the top lease purported to grant a contingent interest that might vest outside the perpetuity period, held that the rule should not apply because the top lease did not offend against the object and purpose of the rule against perpetuities. The underlying and fundamental purpose of the rule was said to be the public policy of preventing the fettering of the marketability of property over long periods of time by indirect restraints upon its alienation. Top leases should be exempt from the rule because they actually increase drilling and competitiveness since oil companies whose leases have been "topped" have a greater incentive to drill on leased lands. Given the majority's conclusion on the perpetuities question it was unnecessary for the majority to express any opinion on the trial judge's conclusion on the breach of confidence issue to the effect that by using information gained as part of its title review of Tarragon files, Maxx had breached a duty of confidence owed to Tarragon.

Justice Jackson, in dissent, agreed with the trial judge on the perpetuities point and found no error on the part of the trial judge in his finding of liability on the breach of confidence issue. Jackson did, however, disagree with the remedy proposed by the trial judge. Jackson would have held that since Maxx had caused Tarragon no damage (Tarragon only ever had a void lease) Tarragon had no claim to damages at law. Causation is not an essential element of

the equitable remedies of accounting and constructive trust. For these remedies to be available the plaintiff need only show that the defendant had derived a benefit from the breach of duty (see *ProGas Limited v. AEC West Limited, supra*). However, in the circumstances, a constructive trust was not an appropriate remedy and Tarragon should instead receive an accounting for profits received by Maxx until the time of trial.

In its decision, the majority claimed the jurisdiction to re-write, piecemeal, the common law rule against perpetuities notwithstanding the fact that a bill to abolish the rule in Saskatchewan had died on the order paper. The great virtue of the common law rule is that it gives certainty. It is a rule of law that applies inexorably and with almost mathematical precision. Arguments as to its application are usually confined, as here, to preliminary questions of construction. The same claim can also be made for modern wait and see legislation such as that found in Alberta's *Perpetuities Act*. The same claim cannot be made for this decision. Here is a preliminary list of issues that the Saskatchewan courts will have to deal with now that they have opened Pandora's box: (1) How easy will it be to establish that a particular contingent interest does not violate the object and purpose of the rule? (2) Will a court be able to wait and see in making this decision? (3) Will a court make this decision on the basis of the particular facts, or on the basis of the type of document under consideration? In the present case the court seems to have looked at the category of document rather than the actual facts. Indeed the actual facts were quite damning. After all, the top

lease granted a straight 99 year term (no unless clause) with an option to renew (!) and there had been little action on the lands since the lease had vested. (4) What makes it so clear that top leases in general should not violate the object and purpose of the rule? The reason given by the court is entirely unconvincing. What makes a lessee drill is a short primary term, not the existence of a top lessee. Furthermore, there is nothing inherent in a top lease that creates perpetuity problems. All that the drafter has to do to avoid the rule is to ensure that the option created by the top lease has a term that is no longer than 21 years. (5) If the court's analysis holds for top leases does it apply to all options and similar interests?

In short, there is a lot to be said for the views of Justice Jackson and the trial judge that perpetuities reform, notwithstanding its technical nature, is a job for the legislature and not the courts. In terms of transaction costs, legislative reform should be a lot more efficient than this sort of tinkering.

#### **When is a lessee no longer an operator for the purposes of the Surface Rights Act?**

Suppose that B holds a Crown png lease and has a well licence under the *Oil and Gas Conservation Act* and negotiates a surface lease with the landowner (C). B drills a well on the lands but the well never produces and as result the Crown lease terminates. What happens if B declines to make further payments under the surface lease and thereupon C applies under s. 39 of the *Surface Rights Act* to have the Provincial Treasurer make good the default? Can B deny

liability on the grounds that it is no longer an operator within the meaning of the SRA? Such was the argument in *Legal Oil and Gas Ltd v. Alberta (Surface Rights Board)*, [2001] ABCA 160. The narrow ratio of the Court of Appeal's decision denying the appeal of Legal's judicial review application is that such issues ought not to be decided by appellate courts where the issue has not been put to the decision-maker of first instance.

The Board's own decision (Decision 98/0001) in this matter seems woefully inadequate. While the SRB was no doubt correct to state that Justice Kent had decided in *Todd Ranch v. The Surface Rights Board*, [1995] A.J. 279 that where the elements of s. 39(1) were satisfied the Board must make the order against the Provincial Treasurer, it surely does not stand for the proposition that the Board is entitled to refuse to decide upon submissions to the effect that there is no liability because there is no lease. To establish this point imagine that the Provincial Treasurer made the payment required and then the Treasurer sues B on the statutory debt. B defends on the basis that it has no liability because the lease was no longer binding. A court must have the competence to consider that defence and if it accepts it the Treasurer is left holding the liability with its only recourse being a uncertain restitutionary claim against C. This would be absurd and surely therefore the SRB commits a jurisdictional error when it says (as it did in this case) that counsel's arguments while compelling were "legal in nature" (horror of horrors) and "more properly a matter between the Crown and the Operator".

# Human Rights and Resource Development: Conflicts, Current Law and Proposals for Reform

by Janet Keeping\*

## Introduction

Earlier this year, the Canadian Institute of Resources Law (CIRL), together with the Alberta Civil Liberties Research Centre (ACLRC), applied to the Alberta Law Foundation for funds to support research on "Human Rights and Resource Development". The objective of the Project is to examine the law applicable in Alberta on both human rights and resource development in order to identify and analyze points at which those bodies of law may be inconsistent with one another. The law applicable to Alberta resource development companies working abroad is also to be addressed by the Project. The Alberta Law Foundation approved the funding application and work began on the Project in April of this year.

## The Work That is Planned

The first and most time-consuming part of the Project will be the research necessary to identify both the most significant issues and the law applicable to them. This work is underway and will culminate in a written report on the results of the research. CIRL and ACLRC have expressed the intention to hold a workshop as part of the Project. So, during the research phase a workshop will be planned. The intent of the workshop is to address the questions of most immediate, public concern in a forum which, it is hoped, will attract a wide variety of people. The workshop is likely to be held in June or September of 2002. A background paper for workshop participants will be distilled from the more comprehensive research report. More specific plans for the workshop will be published in later issues of *Resources*.

In the final stage of the Project, recommendations for the reform of both law

and policy will be prepared relating to issues on which the research has been sufficiently detailed to permit precise conclusions. At that time, issues which seem to merit further work will also be identified. It is the intention of both CIRL and ACLRC that the present Project provide a foundation which will enable us to continue to work on issues in the overlap between human rights and natural resources law.

## Scope of the Project

The scope of the Project is potentially very broad, both in terms of the human rights which can be impacted by resource development projects and in the variety of ways in which conflicts between the two bodies of law under study may arise. Concerns about both the physical and cultural well-being of Albertans provide the practical background to the study. The commitment of Canadian governments to achieving sustainable development will constitute the policy context for any discussion of how the law on the identified issues ought to evolve.

As a practical matter, it has been necessary to narrow the scope of the Project to that which can be managed with the time and funds available. Although the law governing the exploitation of other resources also presents possible conflicts with human rights law, on the basis of the work undertaken in the first few months of the Project, it seems likely that both the research and the workshop will focus on the legal regimes for development of hydrocarbons (especially, oil and gas) and forestry in the province. How much time will be spent on the law applicable to Alberta companies working abroad is not yet known.

## Approach to the Work

Although it cannot be denied that the

topic is somewhat controversial, most of the reactions received so far on the Project have been quite positive. In fact, many responses have confirmed the view that motivated application for funding for the Project, namely, that there is considerable support for the idea that an awareness of human rights should inform the way all of our society's institutions are run, including those that are germane to the regulation of natural resource development.

Some people, upon learning of the Project's scope, have assumed that given the focus on human rights, the Project would quite naturally align itself with activism on some of the high-profile controversies surrounding the Alberta oil and gas industry, including those affecting Alberta companies abroad. But the focus of our work is not, and cannot be, advocacy: both CIRL and ACLRC are research institutions, the mandates of which are to bring our respective areas of legal expertise to bear on questions of import to broad sectors of Alberta society. One of the goals we seek to achieve through the Project is professional consideration of certain aspects of Alberta's resource management regimes with an eye to whether they conform with existing and emerging law on human rights. Another is a similarly objective examination of the impact of human rights law for the operations of Alberta companies working in developing countries. One of the advantages of our approach to these matters is that we can provide background materials, and a neutral forum, for informed debate on issues about which many Albertans are concerned.

## Project personnel

The Project is being managed, for CIRL, by Janet Keeping and, for ACLRC, by Linda McKay-Panos. Monique Ross, also of CIRL, will be working on planning and organization of the workshop,

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as well as providing guidance on the research, especially on aspects of forestry and aboriginal law.

The funding provided by the Alberta Law Foundation has also allowed the hiring of a part-time Project Researcher. This position was first held by Patti Sutherland, a member of the Alberta Law Society with extensive

experience in oil and gas transactions, both domestic and international, who was able to stay with the Project until the end of August. The position is now held by Nickie Vlavianos, who completed a Master's degree in law at the University of Calgary last year and is also teaching the Advanced Environmental Law course for the Faculty of Law at the University in the fall term.

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