

The Newsletter of the Canadian Institute of Resources Law

The Dene Tha' Consultation Pilot Project: An "Appropriate Consultation Process" with First Nations?

by Monique M. Ross*

In December 2000, the Alberta Energy and Utilities Board (EUB), the provincial board with the authority to approve energy projects, issued Informational Letter IL 2000-5 to all oil, gas and pipeline operators and mineral rights holders in Northwest Alberta.¹ The Informational Letter encouraged all applicants for energy development applications on lands with registered Dene Tha' native traplines to engage in a consultation process with the affected trappers as outlined in a schedule to the IL. This one-year consultation pilot project, which is currently being assessed and is likely to be continued, is the first of its kind in Alberta's energy regulatory process. The EUB believes that this process may provide an effective and efficient way for project participants to achieve appropriate consultation. This article examines this consultation process with Dene Tha' Aboriginal trappers in the context of the constitutional obligations of the provincial gov-

ernment to consult with Aboriginal people whose rights may be infringed by resource developments. It suggests that this process, while a positive step, does not fulfill the provincial government's constitutional obligations nor its policy commitments towards Aboriginal people, and illustrates the ambiguity of the government's position with respect to the recognition and protection of treaty rights.

The Crown's Obligation to Consult with Aboriginal People

Subsection 35(1) of the *Constitution Act, 1982* imposes an obligation on government to give priority to Aboriginal and treaty rights and to infringe upon these rights only to the extent necessary to achieve a substantial and compelling objective. The Crown must act in accordance with its fiduciary duty to protect Aboriginal interests. One of the indicators of government's efforts to infringe the rights as minimally as possible is the way in which it has consulted with affected Aboriginal people prior to

making a decision affecting their interests. Consultation has become an important factor the courts consider in assessing whether government has made a sincere effort to protect the prior interests of Aboriginal people in

Résumé

En décembre 2000, l'Alberta Energy and Utilities Board, l'organisme chargé de réglementer le développement des ressources énergétiques en Alberta, a approuvé un projet-pilote de consultation avec les Dene Tha' du nord-ouest de l'Alberta. Ce processus de consultation est analysé dans le contexte des obligations constitutionnelles du gouvernement vis à vis des peuples autochtones. Les gouvernements doivent consulter les autochtones avant de porter atteinte à leurs droits ancestraux et issus de traités. Cette obligation est distincte de l'obligation de consultation découlant de dispositions législatives et des règles d'équité procédurale. L'auteur décrit les origines et la nature du processus de consultation avec les Dene Tha' et conclut qu'en dépit de ses aspects positifs, il s'agit là d'un processus réglementaire qui ne remplit pas les exigences de l'obligation constitutionnelle de consultation énoncées par les tribunaux.

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pursuing its objectives and has acted consistently with its fiduciary obligation.

Many legal commentators have analyzed the Crown's obligation to consult Aboriginal people adversely affected by resource developments, and the jurisprudence on this subject is still evolving. The constitutionally based duty to consult owed by the Crown when its unilateral actions or decisions may affect the rights of First Nations is distinct from the obligation to consult based on statutory requirements and administrative law requirements of procedural fairness.² The first duty protects the unique interests of Aboriginal people, while the second typically protects the interests of any third party, including Aboriginal people, who may be adversely affected by government actions. The majority of the recent court decisions on issues of consultation with Aboriginal people focus on the constitutional duty to consult and distinguish it from statutory consultation processes. A recent Federal Court decision confirms that "public consultation" in the context of an environmental impact assessment does not constitute "First Nations consultation" as required by subsection 35(1) of the *Constitution Act, 1982*. At the very least, Aboriginal people whose constitutionally protected rights may be infringed are "entitled to a distinct process if not a more extensive one".³ The court goes on to say that the fact that an Aboriginal community is treated as just another stakeholder in a consultation process may indeed be used as evidence that government has not accorded Aboriginal or treaty rights the requisite priority over those of other users.⁴

Even though the nature of consultation required varies with the right at stake and the infringement of that right, certain minimum acceptable standards of consultation have emerged from the case law. The standards of consultation imposed on the Crown acting in its fiduciary capacity are more onerous than those that arise out of statutory obligations and procedural fairness

requirements. Some of the key findings, briefly summarized, include:⁵

- the constitutional obligation, and the ability to discharge that obligation, rest squarely with the Crown. As a result, government must be involved in the consultation process and cannot simply delegate that duty to a third party without supervising it. The courts scrutinize the way in which government, not industry, has consulted;
- Aboriginal and treaty rights are collective rights. Therefore, consultation must involve not only individuals directly affected in their exercise of those rights, but also community representatives;
- government must initiate the consultation process and obtain sufficient information (including on the practices and views of the affected First Nation) upon which to base a conclusion regarding the impact of proposed developments and land use decisions on Aboriginal and treaty rights;
- government must provide to the potentially affected Aboriginal people full information on the proposed action or decision and its expected impacts, so that they have an opportunity to express their concerns and interests;
- as to the goal of the consultation process, consultation is expected to be at a minimum "meaningful" and the Crown must be prepared to "substantially address the concerns of the Aboriginal peoples whose lands [or rights] are at issue."⁶ Depending on the nature of the right and the seriousness and duration of the proposed infringement of the right: this may translate into a duty to obtain full consent, notably in the context of title lands;
- as to the kinds of government actions or decisions requiring consultation, the case law suggests that any decision affecting the balance between Aboriginal and treaty rights and non-Aboriginal interests in natural resources (such as setting harvesting limits and allocating

resources between various users) requires prior consultation with Aboriginal people.

Alberta's Consultation Policies

In order to facilitate consultation between the provincial Crown and Aboriginal communities whose rights may be impacted by resource developments, some provinces have developed Aboriginal consultation policies that provide guidance to decision-makers in discharging their obligations.⁷ In Alberta, policy documents which mandate a specific consultation process between First Nations and government representatives have not yet been developed. To date, the most comprehensive document addressing consultation issues is the policy entitled *Strengthening Relationships: The Government of Alberta's Aboriginal Policy Framework*.⁸ In this document, the provincial government commits itself to meeting all of its treaty, constitutional and legal obligations respecting the use of public lands.⁹ This includes honouring aboriginal uses as provided for in the various treaties, as well as in the 1930 Natural Resource Transfer Agreement (NRTA). Aboriginal uses are listed as including the rights to hunt, fish and trap on public lands.¹⁰ The importance of consultation and of providing "Albertans" with opportunities to participate in decisions on natural resource development is noted. The guiding principle with respect to consultation is that the government "consults appropriately with affected Aboriginal people and communities when regulatory and development activities infringe their existing rights, such as the rights to hunt, fish and trap for food".¹¹

While the commitment to consult Aboriginal people on resource developments is made, the basis and nature of the duty to consult remain unclear and the language used in the Policy is ambiguous. On the one hand, the Policy asserts that it is the government's role, "not the role of industry", to consult with affected Aboriginal people where constitutional rights may be

infringed.¹² This implies an acknowledgement of the constitutional nature of the obligation owed by the provincial Crown to Aboriginal people. On the other hand, the duty to consult is described as being based on a "good neighbour" approach involving "respect, open communication and cooperation",¹³ and the document states that proponents of resource developments are expected to consult with potentially affected communities and people. Government, Aboriginal communities and industry are encouraged to facilitate dialogue and participate in good faith. It is unclear whether a distinction is made between consultation by government based on infringement of constitutionally protected rights, and consultation by industry in the context of resource developments, which would not be constitutionally based.

The actual scope and content of the consultation process are not defined, and much of the document emphasizes the need for additional policies to make consultation more effective. The Alberta government affirms its commitment "to work with affected aboriginal communities and industry to use existing mechanisms and, where necessary develop new ones for appropriate consultation on resource development and land use decisions".¹⁴ This raises several questions. What is meant by "appropriate consultation"? If the duty to consult is acknowledged as a constitutional obligation, involving a fiduciary duty owed by the Crown to Aboriginal people, then the standards of meaningful consultation should be those outlined by the courts. If on the other hand consultation with First Nations is viewed as part of a general process of consultation with "stakeholders" affected by resource developments, then the "appropriate consultation" test could be met by statutory standards and the requirements of procedural fairness.

Other questions arise in connection with this commitment. What are the "existing mechanisms" for consultation with Aboriginal people? If it is the

responsibility of government, not industry, to consult when infringements of constitutionally protected rights are at stake, in which capacity and to what extent should industry be involved in the development of new consultation processes? The Policy document raises more questions than it answers with respect to consultation with Aboriginal people.

The Aboriginal Policy Framework also recognizes the importance of developing traditional use studies to collect baseline information on Aboriginal hunting, trapping and fishing on public lands.¹⁵ However, the Policy is vague with respect to the function of these studies, the role of government in their completion, and their use in the resource development approval process. The government undertakes to facilitate the development of best practice guidelines for such studies, to negotiate protocols with Aboriginal communities to address issues of management and security of sensitive information, and to "work with all interested people to facilitate timely baseline studies".¹⁶ In addition, the government undertakes to work with Aboriginal communities to identify and place notations on specific sites.

Although the Policy does not establish a link between these studies and consultation processes, presumably the traditional use studies would support and give meaning to the consultation process. As noted earlier, determination of potential infringement of Aboriginal or treaty rights as a result of resource developments requires information from potentially affected Aboriginal communities as to their use of the area slated for development. This necessitates community involvement in the collection of this data. Traditional land use studies, which document and map traditional and contemporary land and resource uses by Aboriginal communities, are a means to collect the required information.

To date, the commitments to consult in the Aboriginal Policy Framework have

not yet translated into significant legislative or policy developments that would shed some light on the provincial government's intentions. The legislative and regulatory framework of resource allocation and development has not been amended to reflect the government's commitment to consult with Aboriginal people whose rights may be affected by resource developments.¹⁷ In the context of resource developments, Aboriginal communities and people continue to be consulted as part of a general process of public consultation or consultation with affected stakeholders. No province-wide consultation policies have yet been developed by the various government departments responsible for resource developments or by the department responsible for aboriginal affairs, although the provincial government is considering developing such policies.¹⁸ To a large extent, the government has relied on community-specific or project-specific consultation processes to facilitate the dialogue with Aboriginal communities. For instance, Memoranda of Understanding have been negotiated between the provincial government and certain Aboriginal groups or communities to promote their participation in forest resource developments.¹⁹ The consultation pilot project with the Dene Tha' First Nation is an example of such community-specific consultation processes for energy developments. The rest of this article examines the origins of the process, the nature of the consultation carried out, and the strengths and shortcomings of this particular approach to consultation with Aboriginal people.

Dene Tha' Consultation Pilot Project

Background

The Dene Tha' live in three small communities located in the northwestern corner of Alberta: Chateh (formerly known as Assumption), Bushe River and Meander River. However, the lands on which they traditionally lived, traveled and practiced their subsistence lifestyle (their traditional territories) are vast, extending from northwest Alberta

to northeast British Columbia and into the southern regions of the Northwest Territories (NWT). This territory overlays one of the most productive areas in the Western Canadian Sedimentary Basin, an area that has been subject to intense oil and gas developments since the 1960s.²⁰ The ancestors of the Dene Tha' adhered to Treaty 8 in 1900. The treaty recognized to the Aboriginal signatories the right to continue hunting, trapping and fishing on the lands surrendered in the treaty, subject to certain geographical and regulatory limitations. In 1930, Canada transferred ownership and administrative control of Crown lands and natural resources to the province of Alberta under the Natural Resources Transfer Agreement (NRTA). The provincial government also assumed the federal obligation to fulfill the treaty promises, notably securing a continuing supply of game and fish for the support and subsistence of Aboriginal peoples. Paragraph 12 of the NRTA was included to protect the treaty rights to hunt, trap and fish for food. The treaty rights of the Dene Tha' became constitutionally protected under subsection 35(1) of the *Constitution Act, 1982*.²¹

In 1995, the Dene Tha' began collecting data about their traditional and contemporary land uses and mapping this information to develop a Traditional Land Use and Occupancy Study (TLUOS). The study, completed in 1997, contains ethnographic information and maps of significant sites and areas that "record and illustrate the presence First Nations had, and still continue to have on the land in their traditional territories".²² It became obvious during the completion of the study that community members were very frustrated and felt powerless to protect their land from the impacts of resource developments. The elders felt that the promises made by government at the time of treaty making had not been kept. The hunters and trappers expressed their frustration at their lack of input into decision-making processes affecting their territory.

A Trappers' Committee was formed in September 1996 "to examine concerns raised by the Dene hunters and trappers during the TLUOS project and formulate strategies to attempt to deal with those concerns".²³ The community created the position of Trapper Committee Liaison and developed its own Process for Consultation, which was attached as an Appendix to the TLUOS. The process was designed to protect the interests and rights of the Dene Tha' within their traditional territory. Proponents of resource developments were requested to address industry referrals to the Band office and provide the Band adequate time to identify and discuss its concerns regarding the projects. With respect to trappers, project proponents were similarly requested to notify the Band office, not simply the individual trappers affected by a proposal, and the Trapper Committee Liaison was to assist both the trappers and the proponents in the consultation process. Projects were to be assessed on the basis of information collected for the TLUOS.

Some, but not all, of the oil and gas companies active in the Dene Tha' traditional territory endorsed this community-driven consultation process, and the payment of fees charged to the companies for access to information and ground disturbance under a Schedule of Fees set by the Dene Tha'. The provincial government was initially absent from this community-industry consultation process and only became involved with the signing of the Dene Tha' Consultation Project, in September 2000.²⁴ It is this tripartite consultation process, involving the Dene Tha', the oil and gas industry and the government of Alberta, that the EUB endorsed in December 2000. The Dene Tha' Consultation Pilot Project was to remain in effect for the duration of one year, until September 19, 2001. To date, negotiations are ongoing for the long-term continuation of this project, and the requirements outlined in IL 2000-5 still apply to energy development applications.

The Pilot Project

The purposes of the Dene Tha' consultation project are threefold: 1) establish a unique consultation process between oil and gas companies and the Dene Tha' community and trappers; 2) provide funding for capacity building; and 3) provide funding towards the collection and mapping of important cultural information about Dene Tha' traditional use of the lands. Both the Dene Tha' and the oil and gas companies commit to participate in the consultation process, and the companies commit to minimize the effects of their activities on the land and to mitigate these effects relative to the concerns and issues identified by the Dene Tha'. A Steering Committee comprising two government representatives, two industry representatives and four Dene Tha' representatives is to be established to oversee the implementation of the project, with the possibility of bringing in other government or industry representatives as necessary. Funding for this project is assumed by the provincial government and the oil and gas industry, with the Dene Tha' providing in-kind contributions (e.g., office space).

Under the pilot project, the oil and gas companies must prepare and forward to the Dene Tha' Consultation Coordinator a summary of current and anticipated development activity as soon as such activity is identified. In addition, a prior notice of exploration and development activity is sent to both the Senior Trapper and the Consultation Coordinator. The Coordinator organizes a meeting between Dene Tha' departments and affected trappers, the company and a government representative to discuss the proposed Development Plan. The purpose of the meeting is to identify potential employment opportunities and investigate with the affected trappers any concerns arising out of the proposal. If no concerns are identified, a letter is sent to the company stating that there are no concerns. Otherwise, additional meetings may be scheduled to clarify the issues and discuss mitiga-

tion measures. A letter is then sent to the company outlining the steps taken and process followed to date.

The capacity of the Dene Tha' to properly assess the impact of oil and gas development activity is considered key to a meaningful and effective consultation process. Accordingly, one of the first priorities of the project is to build capacity; funding is provided to train personnel to fill the positions identified for the project and to build capacity for Dene Tha' participation in resource development opportunities.

Equally important is the need to complete Traditional Use Studies (TUS). This involves collecting data by means of community interviews and field surveys, and mapping and storing this information, with GIS support. The project creates several positions to that end, including a GIS/Data collection manager, a field technician and several consultation interviewers who are to interview elders, hunters, trappers and land users. Even though no reference is made to the 1997 Traditional Land Use and Occupancy Study (TLUOS), presumably the new TUS are designed to update and complete the data already collected and in possession of the Dene Tha'.

Analysis

This tripartite pilot consultation project endorsed by the EUB includes some of the key elements of a constitutionally-based consultation process outlined earlier. Government, not only the private sector, is now involved in the consultation process. The Band office, not only individual trappers, is an active participant and can identify community concerns and mitigation measures. The project also provides for the collection of essential cultural and land use data to inform the resource development process. The collection of this data is entrusted to the community, rather than being left to the project proponents as is often the case with environmental impact assessments. The funding of several positions within the

community to conduct interviews with elders and land users, undertake field surveys, monitor fixed sites and assist with the storage and dissemination of information ensures both community involvement in and community control of the data collection process. Funding is also provided for consultation with the community at large. The TUS, along with the 1997 TLUOS, should enable government and the private sector to fully inform themselves of the land uses, practices and views of the community. They should also allow all parties to properly assess the impacts of proposed oil and gas activities on Dene Tha' traplines.

Nevertheless, the consultation process lacks other key components of a meaningful constitutionally-based consultation process. Most importantly, consultation in the context of energy development approvals by the EUB is not designed to accord priority to the constitutional rights of the Dene Tha' nor to address issues of minimal infringements of these rights. As such, this process can only be categorized as a regulatory-based consultation process with affected stakeholders.

To begin with, the consultation process occurs at a late stage in the energy development process, after key resource allocation decisions have been made by the provincial government. The companies proposing to develop wells or build pipelines on Dene Tha' traplines have already been issued subsurface mineral rights by the Department of Energy. These rights entitle companies to drill for and recover oil and gas in a specific area. No consultation with the Dene Tha' is required at this critical stage in the decision-making process. The EUB-endorsed consultation takes place when the Board approves the drilling of wellsites, the construction of production facilities, pipelines and access roads. This is not the proper time to "substantially address" Dene Tha' concerns related to the scale and intensity of energy developments, the cumulative impacts on the land and on their land uses, and the

proper accommodation of treaty rights with those of other land and resource users.

Further, the EUB has stated in several of its decisions that it does not have the jurisdiction to deal with treaty and aboriginal rights nor to decide where they apply.²⁵ As a provincial regulatory agency with a mandate to regulate energy development in the public interest, the Board takes the view that it does not owe a fiduciary obligation to Aboriginal people.²⁶ The Board has rejected arguments that it does not have the authority to grant approvals for energy developments, except with the consent of the affected Aboriginal community, on lands that are subject to claims of aboriginal title and rights.²⁷ The Board acknowledges that consultation with Aboriginal communities may warrant the use of different consultation techniques in order to accommodate cultural differences and the unique political structure of native groups.²⁸ However, it has refused to accept that the failure to directly involve an Aboriginal community in a traditional land use study and to collect thorough information from the community regarding the direct and cumulative environmental effects of a proposal on the community, its lands and its ability to exercise traditional activities qualified as improper consultation.²⁹

The consultation pilot project endorsed in IL 2000-5 fits within the Board's general consultation policy. The consultation area is defined by the registered trapline areas of the Dene Tha' trappers listed in an Appendix to the IL, and does not extend to what the Dene Tha' define as their traditional territory.³⁰ The EUB recognizes registered traplines as an interest in land that warrants protection against encroaching developments. It is on the basis of this provincially allocated and regulated trapping right, not on the basis of their treaty right to trap, that the Dene Tha' trappers are entitled to be consulted by applicants for energy developments. The consultation process with Dene

Tha' trappers is part of the public consultation requirements outlined by the EUB in its Energy Development Application Guide, not a separate consultation process based on the potential infringement of the Dene Tha' constitutional rights. Indeed, the Dene Tha' Consultation Project is careful to state that it does not "define, create, abrogate or extinguish any of the DTFN's existing aboriginal and treaty rights", and that "this project is not a Trappers compensation agreement nor a treaty or land claims agreement under ss. 25/35 of the Constitution Act, 1982." The consultation process is simply designed to attempt to mitigate the adverse impacts of energy developments on the Dene Tha' as affected stakeholders, as well as offer some socio-economic benefits to the community. It does not purport to protect their constitutional rights.

Conclusion

The Dene Tha' pilot consultation project illustrates the ambiguity of the provincial government's position regarding consultation with Aboriginal people in the context of resource developments. Despite the statement, in the Aboriginal Policy Framework, that government will meet its constitutional obligations to Aboriginal people in the context of land and resource developments and honour their treaty rights, it has yet to develop the necessary tools to implement this commitment. The consultation process with the Dene Tha' represents significant progress in the way the EUB deals with Aboriginal communities affected by energy developments. However, it falls short of meeting the standards of "meaningful consultation" set by the courts. If the EUB does not have the authority to deal with Aboriginal and treaty rights, then the provincial government needs to provide Aboriginal communities opportunities for proper consultation at other stages in the resource allocation and development process. Only then will the government be able to establish that it has made genuine attempts to infringe Aboriginal and treaty rights as

little as possible in its pursuit of economic development.

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Notes:

1. EUB Alberta Energy and Utilities Board, Informational Letter IL 2000-5, December 19, 2000, Dene Tha' Consultation Pilot Project (2000-2001).
2. See Robert J.M. Adkins & Elissa A. Neville, "Consultation with First Nations: Revisiting the Sources and Nature of the Obligation" (National Environmental Law Conference, The Canadian Bar Association, March 2000, Calgary, Alberta). Requirements for consultation between project proponents and an aboriginal group can arise from statutory and regulatory processes for resource development approvals, such as environmental impact assessment processes.
3. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2001] F.C.J. No. 1877 at para. 153.
4. *Ibid.* at para. 155.
5. An overview of consultation requirements outlined by the courts is found in Cheryl Sharvit, Michael Robinson, Monique Ross, *Resource Developments on Traditional Lands: The Duty to Consult*, Occasional Paper #6 (Calgary: Canadian Institute of Resources Law, 1999).
6. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 1113; the obligation to "effectively address the substance of the Tlingit's concerns" is also affirmed in *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*, [2000] B.C.J. No. 1301; and *Taku River Tlingit First Nation v. Ringstad et al.*, [2002] B.C.C.A. 59
7. See for example, Province of British Columbia, Ministry of Aboriginal Affairs, *Crown Lands Activities and Aboriginal Rights Policy Framework*, January 1997; and *Consultation Guidelines*, September 1998; Ministry of Forests, British Columbia Ministry Policy Manual. *Policy 15.1 – Aboriginal*

Rights and Title and Appendix – Consultation Guidelines, June 1999; see also Saskatchewan Environment and Resource Management, *Aboriginal Consultation Guidelines* (Regina: Province of Saskatchewan, January 2000).

8. Government of Alberta, *Strengthening Relationships: The Government of Alberta's Aboriginal Policy Framework* (Edmonton: 2000).
9. *Ibid.* at 14.
10. *Ibid.* at 17.
11. *Ibid.* at 18.
12. *Ibid.* at 15.
13. *Ibid.*
14. *Ibid.* at 18.
15. *Ibid.*
16. *Ibid.*
17. By contrast, British Columbia enacted in 1998 the *Oil and Gas Commission Act*, S.B.C. 1998, c. 3, which is designed to encourage the participation of Aboriginal people in oil and gas and pipelines-related processes affecting them. Several Memoranda of Understanding establishing consultation processes between the provincial government and First Nations respecting oil and gas activities have been signed in northeast British Columbia since 1998; the Oil and Gas Commission assumes responsibility for the conduct of consultation.
18. Conversation with Jamie Honda-McNeil, Manager, Resource Initiatives, Department of Aboriginal Affairs and Northern Development (January 2002).
19. Some of these are listed in Government of Alberta, *Provincial Initiatives Directed Toward Aboriginal People in Alberta* (Edmonton: September 1996). They include Memoranda of Understanding signed with Whitefish Lake First Nation (1994) and the Little Red River/Tallcree First Nations (1995).
20. Hay/Zama/Rainbow Lakes, in the heart of the Dene Tha' traditional territory, is one of the areas that has experienced the highest densities of seismic lines, roads, wellsites, processing plants and pipelines in Alberta: Alberta Environmental Protection, *The Boreal Forest Natural Region of Alberta* (Edmonton: Alberta Environmental Protection, 1999) at 75.

21. An analysis of Treaty 8 rights to hunt, trap and fish and the impact of the NRTA on these rights is found in the Supreme Court decision *R. v. Badger*, [1996] 1 S.C.R. 771.

22. *Dene Tha' Traditional Land-Use and Occupancy Study* (Chateh, AB: The Dene Tha' Nation, 1997) at 8.

23. *Ibid.* at 16.

24. See *supra* note 1, EUB Information Letter IL 2000-5, Schedule "A".

25. E.g., Conwest Exploration Co. ERCB Decision D94-6, 12 August 1994, at 15; Amoco Canada Petroleum Co. Application for an Exploratory Well, Whaleback Ridge Area. ERCB Decision D94-8, 6 September 1994, at 7-8.

26. This is also the position of the National Energy Board (NEB), based on a Supreme Court decision in the case of *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at 184.

27. Proceedings Regarding an Approved Sour Gas Plant Unocal Canada Management Ltd. Slave Field (Lubicon Lake Area), ERCB Decision 95-4, 23 February 1995, at 14.

28. Applications for Well Licences, Moose Mountain Area, Husky Oil Operations Ltd., ERCB Decision D94-2, 11 March 1994, at 5.

29. Shell Canada Limited Muskeg River Mine Project, EUB Decision 99-2, 12 February 1999, at 8-9.

30. See *supra* note 1, Schedule "A" Introduction. In practical terms, this is not significant as the traplines cover the majority of the Dene Tha' traditional lands within Alberta and all trapline holders in the area are Dene Tha'.

Recent Developments in Canadian Oil and Gas Law

by Nigel Bankes*

Supreme Court upholds *Dynex*: GORs and NPIs may be interests in land

It came as something of a surprise, at least to this reviewer, when the Supreme Court of Canada agreed to hear this case since it had declined to hear the test case litigation in *Scurry Rainbow Oil Ltd. v. Galloway Estate*, [1993] 4 W.W.R. 454, aff'd [1995] 1 W.W.R. 316, leave denied [1994] S.C.C.A. 473, and it must have been a pleasant surprise for counsel for the respondents, the GOR holders, to find Justice Major sitting on the bench for the appeal. The case had come to court upon the liquidation of Dynex. The Bank of Montreal (BoM), a secured creditor of Dynex, had taken the view that GORs and NPIs created by Dynex out of its working interest, and protected by way of caveat, were not interests in land capable of binding the Bank, and that the properties should therefore be sold by the trustee in bankruptcy free of the GORs and NPIs.

The BoM had applied to the Court for a preliminary determination that GORs could not, as a matter of law, constitute interests in land. The argument was an old one: an oil and gas lease is a *profit a prendre* which is an incorporeal hereditament; the holder of an incorporeal hereditament cannot grant another incorporeal right out of the profit ("no rent on a rent"). Justice Rooke at trial [1996] 6 W.W.R. 461 had accepted this submission but the court of appeal had reversed [2000] 2 W.W.R. 693, largely on policy grounds, preferring instead the powerful dissenting opinion of Justice Laskin in *Saskatchewan Minerals v. Keyes*, [1972] S.C.R. 703. The unanimous Supreme Court (a seven person bench) in reasons given by Justice Major has affirmed the Court of Appeal essentially for the reasons given by that Court. The strict ratio is that the hold-

er of an oil and gas lease or an interest therein is just as capable of creating a royalty interest that is an interest in land as is the lessor, the owner of the corporeal estate. Whether or not the parties created a GOR will depend upon whether or not the grantor held an interest in land (unfortunately Justice Major quotes the *Vandergrift* case (1989), 67 Alta. L.R. (2d) 17 (Q.B.)) on this point a case in which Justice Virtue held that a provincial natural gas licence did not grant an interest in land – a case which I believe is mistaken on this point) and whether or not the parties intended to create an interest in land. Following the direction of the Court of Appeal the case has gone back to trial on this point.

In deciding whether or not the parties intended to create an interest in land the court has offered little guidance other than to generally support the approach taken in *Scurry-Rainbow v. Galloway* and in *Canco* ((1991), 89 Sask. R. 37 (Q.B.)). Hopefully the lower courts will not turn back to the sterile exercises of the 1960s and 1970s to find this intention in whether or not the royalty was created by reference to substances still in the ground rather than by reference to the proceeds of production (see my comment on the *Hetherington* case at (1987), 50 Alta. L.R.(2d) 350). Equally, one hopes that the lower courts will not pay too much attention to Justice Major's reference to the filing of a caveat to protect the GOR. At most this is evidence of the intention of one of the parties, unless of course the agreement itself contemplates that the GOR holder may file a caveat. For the future, the best practice will of course be a declaratory statement of the parties' common intention while for the past the Court's overall approach suggests a presumption in favour of the GOR as an interest in land.

The Kotaneelee litigation wraps up (for the time being)

After taking up over 360 days of trial time, the parties (and their sixteen counsel) to this protracted litigation have now obtained judgement in a case (actually a consolidation of three separate actions) styled *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Company Ltd.*: [2001] A.B.Q.B. 803, [2001] A.J. 1222. On earlier related proceedings see *Allied Signal v. Dome*, [1991] 6 W.W.R. 251, rev'd [1992] 5 W.W.R. 377 (Alta. C.A.). The crux of the case was CMO/CSP's allegation that the successors in interest (the current working interest holders) to a 1959 farmout agreement (as subsequently amended) were in breach of a covenant "to assure the earliest feasible development and marketing of oil and/or gas found on the properties." Gas was discovered on the lands in the 1970s and a dehydration plant constructed. Limited sales were made through the Westcoast system in 1979 and 1980 but the plant was mothballed in 1983 and there was no further production until 1991. CSP (which converted from a working interest to a carried interest) also argued that certain costs had been improperly charged to a carried interest account thereby deferring payout.

Justice MacLeod's conclusion on the marketing issue were as follows. First, there was no implied obligation to market, either generally or specifically in this case. Second, with the exception of those current WI parties who were party to a 1977 amending agreement, the express marketing obligation was not enforceable against successors in interest to the original farmout on general principles of property and contract law. At issue was the burden of a positive obligation which could not be made to run with assignments in the absence of privity of estate or contract (following here the House of Lords decision in *Rhone v. Stephens*, [1994] 2 All E.R. 65). Although assignees generally covenanted to observe the terms of the original agreements there could be no finding of an express or an implied

novation since, *inter alia*, the promisee never discharged the original promisors of their obligations. Neither could CSP/CMO rely upon the concepts of conditional benefits or the pure principle of benefit or burden (see *Tito v. Waddell*, [1977] 3 All E. R. 129 (Ch. D.)) in the absence of a clear enough connection between the rights assumed and the associated obligations. Neither could CSP/CMO rely upon the fiduciary's duty of undivided loyalty (rather than self-interest) either to cause the marketing covenant to run or to serve as a proxy for it. The defendants, whether as joint venturers, working interest owners, or as operator, did not owe a relevant fiduciary duty to CSP/CMO, either on the basis of the category of relationship or on the basis of a facts and circumstances analysis. As to the latter it was unreasonable to think that the WI parties would put aside their self-interest in favour of the interests of CSP/CMO and several clause of the contracts (e.g., entire agreement clause) pointed in the other direction. And finally, neither could CSP/CMO rely upon a stipulation in the 1959 agreement to the effect that all the covenants of the agreement "shall run with and be binding upon" the lands. Merely stating something did not make it so and could not overturn the law relating to the burden of positive promises. However, most of the defendants were subject to the marketing obligation by virtue of an amending agreement of 1977 between the CSP/CMO interests and others. The agreement was designed to allow Columbia to earn an interest but confirmed that "operations" would continue to be "conducted in accordance with the existing agreements [for present purposes the 1959 agreement] as hereby amended" The marketing obligation had not been amended and other elements of the agreements made it clear that the term "operations" was broad enough to include marketing.

Third, (and it was necessary to consider this point since at least one of the defendants was simply a corporate successor by amalgamation of one of the

original parties rather than a purchaser for value and other defendants were bound by virtue of the 1977 amending agreement) there was no breach of the covenant on the facts. The difficulties facing the producers in their efforts to market gas from the late 1970s onwards included regulated prices, absence of new (i.e., incremental) markets, a supply glut, the need to factor in pipeline demand charges, and a contractual preference for BC-sourced gas on the Westcoast system. Although Justice MacLeod declined to provide a definitive interpretation of the covenant, he did hold that the term "feasible" did not simply connote physically possible or doable but "must be construed as including a commercial or profit element" and that must refer to "all the parties from to time involved with the marketing of the field" while at the same time denying the opportunity of any party to arbitrarily or capriciously take the view that a market was not feasible for them. Implicitly, and perhaps explicitly, he also held that the clause could not be interpreted as requiring a party to market Kotaneelee gas in priority to its other gas for which it might have a higher profit margin. The obligation to market was a continuing obligation (as distinct from a continuing cause of action) and did not expire at the end of the exploration phase, when gas was first marketed or when CSP/CMO converted to a carried interest. The evidence of the defendants' efforts to market showed that they did not act unreasonably in striving to establish firm long term contracts.

As to the carried interest account, CSP/CMO had the right to challenge charges to that account on several grounds, including the right to audit, and was not prevented from doing so merely because it was a carried interest party and not a WI party. CSP/CMO could also challenge on the basis that the work was not carried out in a good and workmanlike manner; the defendants could not rely upon a standard of gross negligence because this limitation on liability was not opposable against a

carried interest party. Here the evidence showed that operator's revamping of the gas processing facility was negligent, and, in particular, the defendants were not entitled to charge the carried interest account with the costs of additional pollution control equipment which, while not legally required, had been strongly pressed upon the operator by the regulator. There was no breach of duty with respect to a well workover since the corrosion problems encountered related to the inability to produce rather than the failure to take care of the well while it was suspended.

Finally, while the plaintiffs could not claim that the processing plant was to be constructed at the sole cost, risk and expense of the farmees (while the farmees committed "to provide the necessary facilities to place the Test Well on production" the plaintiffs' contention involved reading the concept of "completion" as including the construction of the plant) the plaintiffs were successful in denying that the plant fell within a clause that precluded the processing plant from being included within "operational costs" and allowed a processing fee to be charged. Justice MacLeod accepted the argument that a dehydration facility (which the subject plant was) was not a gas processing plant within the meaning of the relevant clause. Justice MacLeod's judgement contains a useful affirmation and application of basic principles of property law in the context of the assignment of oil and gas contracts. It is similarly useful in the context of fiduciary duties and in particular its affirmation that one should not readily import fiduciary concepts into a commercial context. However, it is possible that Justice MacLeod mis-frames the threshold for establishing a fiduciary relationship in the context of a joint venture or other similar relationship. I suggest that a fiduciary duty arises when it is reasonable for the beneficiary of the duty to reach the conclusion that the other party will act in the best interests of the *joint venture* rather than in its own self-interest. Justice MacLeod's formulation would substi-

tute "the beneficiaries' best interests" for "best interests of the joint venture" and further suggests at one point that there must be a mutual understanding to create a fiduciary duty. As to the marketing obligation, if one begins with the premise that in the face of a silent contract CSP/CMO would be dependent upon the self interest of the working interest parties in deciding to market this gas rather than other gas, it is hard to see what, if any, were the additional obligations that the farmees assumed on the basis of Justice MacLeod's interpretation of the clause. That said, even a more comprehensive statement of the meaning of the clause should not have resulted in a different conclusion for the record amply demonstrates both the efforts made to find markets for the gas as well as the difficulties associated with marketing frontier gas when alternative sources of supply are closer to hand.

Court of Appeal reverses case management judge in royalty trust litigation

The decision at first instance in *Astl v. Montreal Trust Co.* is reported and critiqued in this Newsletter at issue no. 68. The case involved gross royalty trust agreements (GRTAs) that were likely covered by the ratio of the Court of Appeal's decision in *Guaranty Trust Co. v. Hetherington* (1987), 50 Alta. L.R. (2d) 193 (aff'd) on different grounds, (1989), 67 Alta. L.R. (2d) 290 (C.A.) and had therefore expired when the lease in force at the time the GRTA was created, expired in accordance with its own terms. Royalties on these GRTAs having been paid into court pursuant to interpleader orders, Montreal Trust now sought further direction. Justice Mason, the case management judge, had decided that unless the mineral owners were prepared to commence an action to collapse existing GRTAs (i.e., GRTAs *apparently* covered by *Hetherington* but not declared to be invalid), the royalties should be paid out to the unitholders under the trusts.

The Court of Appeal has reversed [2002] A.B.C.A. 21 on two grounds: (1) there could be no payment out of interpled funds absent a determination as to who was entitled to the funds, and (2) it was inappropriate to cast the entire burden on the mineral owners when the preliminary assessment suggested that all of these GRTAs had expired with the first lease on the lands. Consequently, the Court has ordered instead that the mineral owners should commence the collapse applications, with solicitor client fees paid from the interpled funds. Where counsel fail to make such an application, further direction might be sought by any party from the case management judge at which time further inferences might be drawn in relation to particular trust agreements and resulting royalty entitlements.

The discretion to extend limitation periods in environmental matters

CanOxy had operated a sour gas well for 20 years. Jagar subsequently acquired the property for development incurring considerable remediation costs which it sought to recover in an action against CanOxy. Without admitting that it had a limitations problem, Jagar made an application under section 206.1 of Alberta's *Environmental Enhancement and Protection Act*, R.S.A. 1992, c. E-13.3 seeking an order extending applicable limitations periods. That section allows the court to extend a limitation period "where the basis for the action is an alleged adverse effect resulting from the alleged release of a substance into the environment." While Jagar's application was denied on a without prejudice basis on the grounds that the necessary information pertaining to the statutory criteria that had to be applied was not before the court, the case (the first on s. 206.1) *Jagar Industries Inc. v. Canadian Occidental Petroleum Ltd.*, [2001] A.B.Q.B. 182 (2001), 37 C.E.L.R. (N.S.) 242, should at least serve to draw attention to this unusual provision.

Perfecting security in a sale of oil and gas assets

Milagro sold a 50% interest in the Battlecreek properties to Merit. Merit covenanted that in default of its obligations to pay the purchase monies pursuant to a promissory note, Merit would execute the necessary documents to provide Milagro with a security interest in the property. In December 1999 Milagro delivered security documentation to Merit requesting that it execute the necessary documents. Merit failed to do so. It subsequently obtained protection under the *Companies' Creditors Arrangement Act* and later made an assignment in bankruptcy. In *National Bank of Canada v. Merit Energy*, [2001] A.B.Q.B. 680 the Court held that Milagro was a secured creditor. While the agreement to grant security contained in the conveyance did not give Milagro security because it was no more than an offer to give security, the equitable mortgage was perfected when Milagro demanded execution of security documents since that amounted to an acceptance of the offer. A further claim by Milagro on a clause dubiously referred to in the contract as both a penalty and as unliquidated damages was held to be unenforceable as being unconscionable and because its formula failed to serve as a genuine pre-estimation of damages. In essence the clause stipulated that if Merit failed either to pay the purchase price in full by a prescribed date or to incur development expenses on the property, then the amount due and payable to Milagro would be any amount still owing on the promissory note plus any shortfall in development expenditures.

Federal Court of Appeal Confirms Tax Treatment of Payments under the Saskatchewan Road Allowances Crown Oil Act

The Federal Court of Appeal in *Mobil Oil Canada Ltd v. Canada*, [2001] F.C.J. 1656 has confirmed the decision of the trial division reported in this Newsletter at issue no. 68 to deny the deductibility of payments under RACOA. The reason-

ing of the court is somewhat different from Justice Nadon's judgement at trial. Justice Sharlow for the Court of Appeal took a broad view of the term "royalty" as used in the federal *Income Tax Act*. The Court took the view that the term did not necessarily have its ordinary commercial usage since it dealt with payments made to the Crown and in that context "royalty" referred to Crown prerogatives or Crown rights. As such, the term need not refer to amounts paid pursuant to the right or privilege to explore for, bring into production, take, or dispose of, oil or gas but might also include any share of resource production that is paid to the province in connection with its interest in the resource (here its ownership of road allowance oil).

Enron Canada, Round One

The insolvency of Enron Canada's American parent triggered counterparty contractual rights to terminate and net out existing forward commodity contracts on the grounds that EC's guarantor (the parent) had failed to maintain an adequate contractually permissible credit rating. Endeavouring to remain in business, EC sought a court order staying the termination rights of the counterparties. EC relied on s.192 of the *Canada Business Corporations Act* (CBCA) rather than the more obvious *Companies' Creditors Arrangement Act* (CCAA) because it was clear that under the latter forward commodity contracts of this type would be treated as "eligible financial contracts" not subject to a stay order under that the CCAA: *Re Blue Range Resources* (2000), 192 D.L.R. (4th) 281 (Alta. C.A.) In oral reasons for judgement in *Re Enron Canada Corp.*, [2001] A.J. 1611 Justice Hart dismissed the application. The commodity futures market is a high risk market in which the parties adopt a variety of techniques to manage their financial risks including parental guarantees and termination and netting out rights. To grant a stay would be to fundamentally change the agreed allocation of risk and it was inappropriate to grant the order.

Enron Canada, again

Under an ISDA Master Agreement both IMC and EC provided irrevocable standby letters of credit to support their potential indebtedness to the other party from time to time. Following Enron Corp's application for chapter 11 protection in the US, EC issued a demand note to IMC for an indebtedness under three swap arrangements covered by the ISDA Agreement. In *IMC Canada Ltd. v. Enron Canada Corp.*, [2001] A.B.Q.B. 1121, IMC took the position that in the event of a default by virtue of the bankruptcy or insolvency of its credit support provider, EC could not draw on the letter of credit and sought to support this position by action and by way of an application for an interlocutory injunction. Justice Wilkins denied the application on the grounds that IMC had failed to establish irreparable harm and had failed to establish that the balance of convenience favoured the applicant. EC, unlike its American parent was not insolvent, and there could only be irreparable harm if EC was insolvent and if EC ends up owing money to IMC rather than vice versa, and that would depend upon the future price of gas. IMC could choose to pay instead of allowing EC to call on the line of credit, and if IMC wanted further protection from future calls by EC it could terminate the contract for breach. IMC could also call on EC's letter of credit in the event that EC became bankrupt.

Interpleader proceedings with respect to oil and gas properties

M sued the P & R partnership alleging that P & R held XYZ oil and gas property (BC Crown oil and gas rights) on a constructive trust. P & R subsequently dissolved their partnership. The XYZ asset was transferred 75% to R with the remaining 25% to be held by an independent third party fiduciary pending "final resolution of the issue of ownership". R settled with M. P commenced a second action against R alleging that R held the remaining 25% interest in XYZ in trust for P and directing an

assignment of that interest. R defended by taking out interpleader proceedings seeking appointment of a judicial trustee. The two actions were ordered to be "heard together".

In *Predator Corporation Ltd. v. Ricks Nova Scotia Co.*, [2001] A.B.Q.B. 1110, the court decided as follows: (1) The court could consider as evidence in P's action, evidence tendered in M's action. (2) The words "final resolution of the issue of ownership" could, in light of the commercial context that led to the negotiation of the partnership dissolution agreement, only refer to settlement of M's law suit. It was simply incredible to believe that it might refer (as alleged by P) to P's inability at that time to take a transfer of that interest pending registration with the BC Crown. A delay pending registration cannot sensibly be called "an issue of ownership". (3) Since that was the issue, it was appropriate for the court to accede to the request for a judicially appointed trustee pending final resolution of M's law suit. (4) The order would apply to the proceeds of production from the WI as well as the WI itself thereby rejecting P's claim that it should be entitled to production pending resolution of the litigation. There was no basis on which to limit the trust to title to the WI. (5) R's request to interplead was granted and could recover its costs on a solicitor/client basis from the proceeds of production.

Accretion rights do not extend beyond theoretical or legal section, quarter section or legal subdivision lines

Suppose that B has a certificate of title referring to all that portion of the west half of section 22 not covered by any of the waters of Z lake, containing 88 acres more or less. Z lake is a large lake and covers multiple sections of land. For various natural reasons the waters of Z lake recede exposing section 22 completely but also part of the adjacent section 21. Can B, in an expropriation forum or any other forum, claim title to: (1) the exposed lands of section 22, and (2) the exposed lands of section 21?

It is of course long-standing and clear law in Alberta that B can claim the section 22 lands and if B's title included mines and minerals the accreted title would also include the mines and minerals (see *Eliason v. Registrar, North Alberta Land Registration District* (1980), 115 D.L.R. (3d) 360 (Alta. Q.B.)). In *Johnson v. Alberta*, [2001] A.J. 1023, 2001 A.B.Q.B. 642, Justice Phillips decided that B's accretion rights did not extend across the section line whether that section line had actually been surveyed or not. The limits to B's property would be determined by the "boundaries of the applicable legal section, quarter section [or] legal subdivision within the relative township, or water boundary, whichever is the lesser." "The fact that a parcel of land is surveyed or not surveyed does not affect the validity of title." The case involved the waters of Buffalo Lake, and, as it happens, mines and mineral interests were not involved. In reaching this decision Justice Phillips referred to sections 90 and 91 of the *Land Titles Act* as well as the Alberta Court of Appeal decision in *Pitt v. Red Deer (City)*, [2000] A.J. 1198.

New Publications

Integrated Resource Management in Alberta: Past, Present and Benchmarks for the Future, by Steven A. Kennett. 2002. 35 pp. Occasional Paper #11. \$15.00

Integrated resource management (IRM) is currently being promoted in Alberta in response to resource-use conflicts and the challenges relating to cumulative environmental effects. The Alberta government's ongoing IRM initiative was launched in 1999. An important component of that initiative has been the development of "regional strategies" in two areas of the province. The release in January 2002 of a draft provincial framework for regional strategies marks an important advance for IRM. If approved and implemented, this framework will lead to additional regional strategies across Alberta.

This paper argues that the history of IRM in Alberta provides some important lessons that are directly relevant to the current IRM initiative. The paper begins with a brief review of Alberta's experience with IRM, the origins of which can be traced to the creation of the Eastern Rockies Forest Conservation Board in 1947. The integrative potential of this Board was, however, progressively eroded by the development of Alberta's resource management regime. In the 1970s, the province embarked upon a major IRM initiative that included the Eastern Slopes Policy and the integrated resource planning (IRP) process. By the 1990s, however, it was evident that IRM and the IRP process had failed to achieve integration in environmental and resource management. Furthermore, the IRP process was clearly inadequate to address resource-use conflicts and cumulative environmental effects. This outcome is significant, since the latest IRM initiative includes a commitment to principles and planning processes that resemble in important respects those that were promoted by the Alberta government from the 1970s to the 1990s.

Legal and Institutional Responses to Conflicts Involving the Oil and Gas and Forestry Sectors, by Monique M. Ross. 2002. 38 pp. Occasional Paper #10. \$15.00

This paper examines the inter-sectoral conflicts and ecological impacts resulting from the development of oil and gas and forestry resources in Alberta's boreal forest region and evaluates the legal regime under which the two resource sectors operate. It argues that current policies, legislation and regulations are inadequate to meet the challenge of intensifying resource use and increasing ecological impacts. Structural reforms to the legal and policy regime and clear political leadership are required in order to achieve the effective integration and sustainable development of oil and gas and forest resources. Integration of development

activities is seen as a way to minimize the collective industrial footprint on the landscape and protect the health of ecosystems, as well as to reduce operational and planning costs and resolve inter-sectoral disputes.

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