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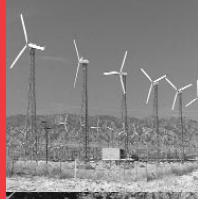

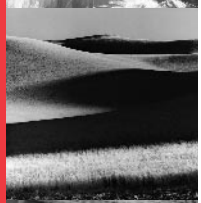
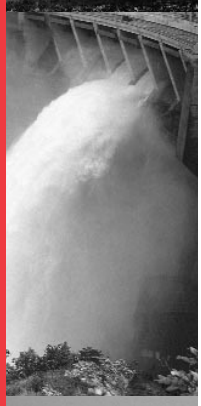

LEGAL ISSUES IN THE HARMONIZATION OF DIFFERENT LEVELS OF PUBLIC AUTHORITY IN RUSSIA: THE CASE OF NATURAL RESOURCE DEVELOPMENT

Article by Mikhail V. Borodach ♦
Introduction by Janet Keeping ♦♦

Introduction

The Soviet Union was the largest country in the world. The Russian Federation, while covering significantly less territory than its predecessor, is still the largest country, by quite a margin. The vast territory covered by the Russian Federation is divided into 89 political sub-units, of various categories. There are republics, krais, oblasts, okrugs and oblasts, although they differ less in their constitutional status than the plethora of categories would suggest was the case.

The Soviet Union was even more complex politically, of course. But, although the Soviet Union was in name a federal state, in practice it was nothing of the kind: Soviet federalism was "merely a matter of form".[1] In fact, it was one of the most highly centralized nations in political history. The Constitution adopted in Russia by referendum in 1993 provides the basis for development of a more authentic federalism. Whether Russian legal and political institutions will evolve towards this end is not yet obvious. But to many observers, one of the keys to a prosperous Russian future is just such a path. Many would say that, only when the various regions of Russia can exert a democratically-shaped influence on the policies, which bear on their people and economies, will the country as a whole flourish, as surely it could. Genuine federalism will not suffice to guarantee a sustainably better future for Russians. But it is **almost assuredly** necessary to making substantial progress in that direction.

Appreciating this line of thought, Russian university curricula now **often** include study of federalism and examination of the federalist systems used in other countries. This is true, amongst other disciplines, in law, where some Russian faculties have taken an especially intense interest in this topic. The Institute of State and Law (formerly, the Faculty of Law) of Tyumen State University is one such institution and is one with which the Canadian Institute of Resources Law has had a working relationship since 1994. In November of that year, Janet Keeping taught in the Faculty of Law. Since that time, CIRL has published research conducted by Tyumen State faculty members and regularly conducts seminars in the Institute of State and Law as part of the "Legal and Management Issues in Energy", which is financed by the Canadian International Development Agency. A member of the teaching staff of the Institute of State and Law instructs in one of the seminars constituting this project and other staff and students participate in the teaching of the seminars.

CIRL is pleased once again to publish an article by a scholar from the Institute of State and Law. This time the author is Mikhail Borodach, a graduate student and lecturer. Mr. Borodach presented the paper, "Legal Issues in the Harmonization of Different Levels of Public Authority in Russia: the case of natural resource development", which appears in this issue of Resources, in a seminar on "Intergovernmental Relations in the Energy Sector" in Tyumen in December of 2001. The importance of natural resources' development to the Russian economy is evident in the tone of the article and in some of the opinions expressed by the author.

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RÉSUMÉ

L'Union soviétique était le plus grand pays du monde. Le territoire de la Fédération russe est beaucoup moins vaste, mais ce pays reste de loin le plus grand au monde. Le vaste territoire occupé par la Fédération russe est divisé en 89 unités politiques qui se composent de républiques, de krais, d'okrugs et d'oblasts. Ces unités diffèrent moins au plan de leur statut constitutionnel que leur nombre ne pourrait le laisser croire.

L'Union soviétique était encore plus complexe au plan politique. Tout en étant de nom un état fédéral, l'Union soviétique n'avait en réalité rien d'une fédération: c'était "simplement pour la forme".[1] La Constitution adoptée par référendum en Russie en 1993 fournit la base du développement d'un fédéralisme plus authentique. Il est encore trop tôt pour juger si les institutions juridiques et politiques russes évolueront dans ce sens. Mais pour un grand nombre d'observateurs, l'une des clés de la prospérité de la Russie passe justement par là. Beaucoup estiment que le pays dans son ensemble ne peut prospérer que si les diverses régions de la Russie peuvent influencer de façon démocratique les politiques concernant leurs populations et leurs économies. Un véritable fédéralisme ne suffira pas à garantir un meilleur avenir pour les russes. Mais tout porte à croire qu'il est indispensable pour vraiment progresser dans cette direction.

Dans cette optique, les universités russes incorporent maintenant l'étude du fédéralisme et des systèmes fédéralistes en vigueur dans d'autres pays dans leurs programmes d'études. C'est notamment le cas des établissements d'enseignement juridique, et certaines facultés russes s'intéressent tout particulièrement à ce sujet. L'Institut de l'État et du droit (précédemment la Faculté de droit) de l'Université de l'État de Tyumen, avec lequel l'Institut canadien du droit des ressources entretient des relations de travail depuis 1994, est l'un de ces établissements. Janet Keeping a enseigné à la Faculté de droit en novembre 1994. Depuis lors, l'Institut a publié les résultats de recherches faites par les membres de la Faculté et a organisé des cours de courte durée à l'Institut de l'État et du droit, dans le cadre d'un projet intitulé "Questions juridiques et de gestion en matière d'énergie" financé par l'Agence canadienne de développement international. Un membre du corps enseignant de l'Institut de l'État et du droit enseigne dans le cadre d'un de ces cours et d'autres membres du personnel et des étudiants contribuent aussi à l'enseignement de ces cours.

L'Institut a le plaisir de publier à nouveau un article d'un enseignant de l'Institut de l'État et du droit. Cette fois, l'auteur est Mikhail Borodach, étudiant de troisième cycle et assistant à l'Institut de l'État et du droit. M. Borodach a présenté l'exposé publié dans ce numéro de Ressources, intitulé "Questions juridiques relatives à l'harmonisation des divers niveaux d'autorité publique en Russie: le cas du développement des ressources naturelles", lors d'un cours sur les "Relations intergouvernementales dans le secteur énergétique" qui a été offert à Tyumen en décembre 2001. L'auteur souligne l'importance du développement des ressources naturelles pour l'économie de la Russie.

Note

1. Theodore H. Von Laue, *Why Lenin? Why Stalin?* (Philadelphia & New York: J.B. Lippincott Co., 1964) at 182.

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

The search for and exploitation of subsoil resources undoubtedly comprise some of the dominant spheres of economic activity in the world today. The welfare of both present and future generations depends greatly on the manner in which these activities are carried out. The natural resources that lie concealed in the subsoil, as in a priceless storehouse of nature are, after all, non-renewable – and this fact should be regarded as of paramount importance in the exploitation of these resources.

It is recognized that the fulfillment of such requirements is impossible without a comprehensible, multilateral policy on the part of the key nations involved in production and refining. Legal mechanisms, together with economic stimuli and incentives, are among the most important instruments for managing the activities of those involved in subsoil use. However, the legal mechanisms existing in Russia are fragile, based as they are on such unstable elements as the country's nascent democratic-legal consciousness, the still-developing legal culture of civil society, and an insufficiently formulated theoretical basis. Thus, we are faced with a number of problems, which while legal in nature, have far-reaching economic and social consequences. It is upon some of the most significant of these problems in the energy sector that the following discussion will concentrate. These issues are of special relevance for the Tyumen region, as it constitutes Russia's most important oil and gas producing area, thus, influencing the question of energy security on a global scale.

[One of the key challenges faced by policy makers in Russia is working out a reasonable division of responsibilities between the central government – the government of the Russian Federation – and the various political units which comprise the country, which are called the "subjects" of the Federation. The current Russian Constitution was adopted in December 1993. Unfortunately, the Constitution is not in all respects as clear on division of powers and responsibilities as might be hoped. In any event, as with any relatively new political structure, many inter-jurisdictional questions have yet to be resolved.]

This article discusses, then, some of the factors that must be considered in addressing the harmonization of powers of the various levels of authority in Russia, especially as regards use of subsoil resources:

1 legislative determination of the powers possessed by different levels of public authority in the Russian Federation with regard to subsoil use;

2 mechanisms for harmonizing the powers of the various levels of public authority in Russia;

3 special features of the political organization of the Tyumen Region;

4 the role of new political and territorial units, i.e. the federal okrugs, in the system of Russian federalism.

Legislative Determination of the Powers Possessed by Different Levels of Public Authority in the Russian Federation with Regard to Subsoil Use

At present, the need to define the powers of the different levels of authority in the Russian Federation is taking on a special significance, not only in the area of subsoil use, but in all spheres of public life. There are several reasons for this:

- First, the Russian system of government today faces serious difficulties regarding administrative effectiveness: the number of civil servants greatly exceeds their accomplishments in carrying out their public functions;
- Second, the distribution of some areas of jurisdiction between the Russian Federation, that is, the central government, and its subjects, that is, the political sub-units [what would be in Canada, the provinces and northern territories] hinders effective law-making by those subjects of the Russian Federation; this is true both of the distribution found in legislation and, in particular, in the Constitution;
- Third, the much needed improvement in relations amongst the various levels of public authority depends on the way issues of the delimitation of appropriate powers and the assignment of areas of jurisdiction are now going to be addressed.

Under the Russian Constitution, questions of subsoil use and use of the resources it contains (including energy resources) fall under the joint jurisdiction of Russia and its subjects. [Editor's note: The one obvious parallel in the Canadian Constitution is jurisdiction over agriculture, which is shared between the federal government and the provinces.] Although these powers are said by the Constitution to be shared, a feature common to all legislative acts

regulating subsoil use in Russia today is a pronounced centralization, resulting in a concentration of some key powers in the hands of the Russian Federation. This concentration of power in the central government authorities is compounded by a passive attitude on the part of the subjects of the Federation toward independent legal regulation.

An example of this phenomenon can be found in the law of the Russian Federation "On the Subsoil". At present, Article 3, Item 1, of this statute provides for the right of the Federation to elaborate and amend legislation of the Russian Federation regarding the subsoil. The term "legislation of the Russian Federation" used here is broad, and on its face covers legislation that is in force throughout the territory of the Federation. On a literal interpretation, this would give the Federation level of government far-reaching powers to regulate use of the subsoil.

Under the Federal Law of 1999 "On General Principles for the Delimitation of Powers", which is presently in force, the Federation has the right only in broad outline to regulate in areas of joint jurisdiction between itself and the subjects of the Federation. An analogous interpretation of the norms of the Federal Constitution was also offered at one point by the Constitutional Court of the Russian Federation. Nevertheless, there had earlier been adopted a series of normative acts substantially limiting the freedom of the regions to implement legal regulation of subsoil use on the basis of local requirements. Such a centralization of powers hardly seems reasonable, and arguably should be resorted to only with respect to subsoil parcels, which have been designated by law to be of "federal significance".

For another example, the federal law of 1995 "On Production-Sharing Agreements" includes a number of limitations on the rights of subjects of the Russian Federation to implement their own legal regulation in this area. Article 1 of this law could have been formulated otherwise: instead of granting exclusive federal rights to regulate these matters, it could have offered the regions the possibility of establishing their own rules for investment activity in the development of energy resources associated with subsoil parcels of regional and municipal [that is, those that are not of national] significance.

It is not only in connection with powers to legislate that this tendency is seen. It is repeated in administrative practice, as well, for example, in the establishment of territorial divisions of Federal government agencies, where there should be no need of such. It is understandable that, in order to realize its authority in areas of exclusive jurisdiction and its powers in areas of joint jurisdiction, it would be appropriate for the Federation to create a body on the federal level with the right to issue binding directives regarding the exercise of the Federation's powers to corresponding bodies of subjects of the Russian Federation, as well as to monitor their implementation. Indeed, the Russian Constitution provides for this possibility in Part 1, Article 78, which grants federal agencies the right to create their own territorial agencies. (It is to be noted that the Constitution does not make this an obligation.)

Obviously, the realization of the right to create territorial subdivisions of federal agencies should be conditional on the absence of a corresponding agency in any particular subject of the Russian Federation, as the latter independently establishes the system of its own agencies. Yet in practice, the central government creates both federal agencies and corresponding territorial agencies to exercise Russia's powers in areas of joint jurisdiction. In subjects of the Russian Federation (and the Tyumen region is no exception) bodies bearing nearly identical names are set up in order to realize the powers that are granted in the corresponding sphere to subjects of the Russian Federation. How much needless expenditure from the federal budget, for example, could be avoided were it not necessary to maintain territorial subdivisions of federal bodies in those places where they should not exist! Agencies of subjects of the Federation could be given support from the federal budget, with supplementary funding allotted from the budgets of the subjects. Clearly, savings achieved in this way would accrue to both levels of authority.

While governmental authority as a whole needs to be strengthened in the sphere of subsoil use, it is clear that, under present conditions, the better approach would be to decentralize regulation. Such decentralization could be achieved by means of various legal instruments, as discussed below.

Mechanisms for Harmonizing the Powers of the Various Levels of Public Authority in Russia

In the contemporary system of Russian federalism, several legal mechanisms for harmonizing the powers of different levels of authority are available: these include legislation and the intra-state [Canadians

would speak of inter-governmental] agreements. The first – legislation – does not present any features of particular theoretical interest. More interesting is the practice of drawing up agreements. These can be of several types.

The first type of intra-state agreement includes those, which delimit areas of jurisdiction between the Russian Federation and its subjects.[1] Of this small group of agreements, the central place is occupied by the Federal Agreement of 1992, which was incorporated into the current Russian Constitution at the time of its adoption in December 1993. At present, agreements on defining areas of jurisdiction between the Russian Federation and its subjects may not redistribute or otherwise alter the division established under the Constitution. These agreements can only make more concrete, or clarify, the areas of jurisdiction that have been already assigned to one level or another by the Constitution.

The second type of agreement concerns the delimitation of powers and areas of jurisdiction of agencies of the Russian Federation and of its subjects. Such agreements are used to regulate relations between government bodies on the federal and regional levels, rather than between Russia and its subjects. Although the areas of jurisdiction established by the Federal Constitution are not subject to alteration by agreement; powers of government agencies may be subject to delimitation by various means. However, the idea of redistributing powers between Federation and subject by means of agreements gives rise to a variety of legal opinion. While scholars assert that such agreements cannot take precedence over a federal law assigning certain powers either to the Federation or to one of its subjects, actual practice contradicts their views.

The redistribution of powers between different levels of authority in Russia can be achieved less controversially through the use of agreements of a third type – agreements on the delegation of powers. Under such agreements, powers can be redistributed by means of their transferal from the federal to the regional and municipal levels, or vice versa. A power transferred by such an agreement, for example, from the federal to the regional level does not cease to be federal in essence: it is merely carried out by a subject of the Russian Federation, instead of by the Federation. At the same time, the financial support needed for the realization of this power is transferred as well.

Although the use of these agreements, that is, for the delegation of powers does not infringe upon the legislative structure for distribution of powers among the different levels of authority, federal authorities seem to prefer the other two forms – agreements on delimiting areas of jurisdiction and powers. The reason seems to be that these agreements more directly address the problems encountered in day-to-day inter-jurisdictional affairs in Russia. After all, as S. Shakhrai, one of the proponents of the use of intra-state agreements, stated in 1994:

> " the agreement on delimiting areas of jurisdiction and powers currently constitutes the only constitutionally possible method for resolving formal contradictions between the Constitution of the Federation and the constitutions of its constituent republics, since in this case the norm of the agreement has priority over the norm of law."[2]

But a claim that agreements take precedence over conflicting law is not true, indeed cannot be true, in legal terms. At best, this is statement asserts a political or psychological fact. From the legal point of view, it is self-contradictory.

Special Features of the Political Organization of the Tyumen Region

The Tyumen Oblast is itself a subject of the Russian Federation (i.e., it is one of the 89 political sub-units of the country), but it also includes two other subjects of the Federation – the Yamalo-Nenets Autonomous Okrug and the Khanti-Mansiisk Autonomous Okrug – each with rights equal [in some sense] to that of the Oblast. In other words, the Tyumen Oblast is a sort of territorial, Russian stacking doll: the territories of the aforementioned autonomous okrugs are simultaneously territory of the Tyumen Oblast: the okrugs fit within the oblast, as the oblast fits within the Russian Federation. Each of these three subjects of the Russian Federation (both of the okrugs and the oblast) enjoys identical competence on the same matters, but each realizes this competence only on territory under its individual control. Thus, the competence of the Tyumen Oblast as a whole is free from overlap with the competence of the autonomous okrugs only in the southern part of the Tyumen region (to which neither okrug extends), and thus decisions of state agencies of the Tyumen Oblast have no legal force on the territories of the autonomous okrugs, although, as mentioned earlier, the territory of the

autonomous okrugs simultaneously constitutes territory of the oblast. Any such interpretation of the division of authority amongst the two types of subjects (the oblast and the okrugs) has enormous significance for the natural resources sector, as the vast deposits of oil and gas in the Tyumen region are found in the two okrugs, and almost not at all in the remaining, southern tip of the oblast.

The account given above is the best, current understanding of the jurisdictional relationship amongst the oblast and okrugs. But thinking and writing on the question has not always been consistent with it. The basis of the controversy is divergent readings of the provisions of Article 5, Part 1, and Article 66, Part 4, of the Constitution of the Russian Federation. These proclaim the equality of all subjects of the Russian Federation – in particular, of oblasts and the autonomous okrugs, which are "included" in their structure. The problems start when it is asserted that inclusion of the okrugs in the oblast structure entails that the competence of the oblast takes precedence with regard to issues that are left by the Constitution of the Russian Federation to the jurisdiction of subjects of the Russian Federation, and that the autonomous okrugs have the right to realize their own competence only in cases where the oblast has not legislated [or, as Canadians would say, "occupied the field"]. It is clear that on one and the same territory, two constitutionally equal subjects of the Russian Federation cannot realize a competence which, under the Constitution of the Russian Federation, covers one and the same matters.

Scholars have argued for the principle of non-interference by the oblast in the competence of the autonomous okrugs. This position presupposes that the autonomous okrugs can be included in the oblast without being included in its structure. This position is supported by the fact that neither the changes made at the start of the 1990s to the 1978 Constitution of the RSFSR, nor the Federation Treaty of 1992, nor the 1993 Constitution of the Russian Federation, if interpreted literally, allows one to draw an unambiguous conclusion as to whether the autonomous okrugs are indeed included in the structure of the krais and oblasts. For example, Articles 83 and 84 of the Constitution of the RSFSR were amended in 1990 to state that the autonomous okrugs are part of the structure of Russia and may be included in a krai or oblast.

The current Russian Constitution limits itself to determining the formulation of relations of autonomous okrugs with an oblast or krai, within the structure of which they are included. In this case the term included can be read in two ways: either in the context of the idea that the autonomous okrugs have been included in the structure of the krai or oblast from the very beginning, as an axiomatic assumption; or in a manner such that the force of the norm extends only to those autonomous entities included in the krai or oblast structure as a result of a mutual desire for such an inclusion on the part of both the autonomous okrug and the krai or oblast. This second interpretation leaves open the possibility of autonomous okrugs that are not included in the structure of any krai or oblast. All things considered, this second interpretation is preferable: the inclusion of an autonomous okrug within the structure (that is, jurisdictional purview) of a krai or oblast constitutes a right of the autonomous entity; it is not axiomatic.

With regard to the Tyumen region, it can be confidently asserted that the Yamalo-Nenets and Khanti-Mansiisk Autonomous Okrugs are included in the structure of the Tyumen Oblast, because this fact has been established in the Charters of the two okrugs. Yet insofar as the inclusion of these autonomous okrugs in the structure of the Tyumen oblast remains their right, the jurisdiction of the oblast ends where the territory of the okrugs begins. Accordingly, questions of extending the competence of the oblast to the territories of the okrugs should in every case be resolved on the basis of agreements between the agencies of state authority of each of these three subjects of the Russian Federation.

The Role of New Political and Territorial Units (Federal Okrugs) in the System of Russian Federalism[3]

The idea behind the creation of the federal okrugs and the consolidation of their territorial basis in the precise form in which they exist today cannot be understood solely in economic terms. The creation of the federal okrugs was above all a political decision. This opinion has also been expressed by several legal scholars. For example, I.A. Sarycheva, Candidate of Legal Sciences and adviser to the staff of the Security Council of the Russian Federation, considers that the "division of the country into federal okrugs was carried out for political, rather than economic purposes. The drive to establish independent territorial agencies of federal agencies of executive authority … was what predetermined the division of the country into federal okrugs differing from those macro-regions [i.e.,

conglomerates of subjects] that had objectively taken shape towards the end of the 90s in the form of eight interregional associations for economic cooperation."[4] Moreover, at present the authorized representatives of the President of the Russian Federation in the federal okrugs have been actively promoting the creation of economic boards. At the same time, activities of the interregional associations for economic cooperation among subjects of the Russian Federation are being curtailed. As noted by I.G. Machul'skaia,[5] the Federation Council's appointee to oversee the Siberian Federal Okrug, it may be that the "Siberian Covenant" association is the only one to enjoy genuine support from the authorized representative of the President of the Russian Federation in the Siberian Federal Okrug. Nothing of the kind can be observed for the other interregional associations of economic cooperation.

It is thus unfortunate that the decision to create the federal okrugs recalls the principle of "divide and conquer": the circumstances detailed above only testify to the political instability of the federal center and to a lack of confidence – particularly on the part of the President of the Russian Federation – in the loyalty of the regions. Otherwise, there would be no reason to create the federal okrugs and it would have been sufficient to expend the same effort strengthening the position of the associations for economic cooperation, the development of ties between these associations, and so on.

On the other hand, it could be dangerous in a federal state to permit a concentration of resources in groups of regions, as this might pose a threat to the political integrity of Russia. It would seem that the creation of the federal okrugs was above all a political decision driven by the goals of:

- Preserving the federal structure of the Russian state; and
- Attempting to equal the political potential of the regions by extending to them the reach of presidential authority via the authorized representatives.

While these may well have been the reasons for appointing Presidential representatives in the seven regions, the actual role that they play within the system of Russian federalism is another matter. In order to discuss this, it is necessary to analyze the powers of those bodies and officials whose actions serve to implement the "political line" of the Russian Federation within the territorial framework of the federal okrugs. It is also necessary to discuss the status of the authorized representatives of the President of the Russian Federation in the federal okrugs.

First, mention should be made of the political accountability of the authorized representative to the President of the Russian Federation. The authorized representative is in charge of realizing the constitutional powers of the President of the Russian Federation within the federal okrug, and, as a representative of the nation's supreme officeholder, cannot act in opposition to his political views. (Otherwise, of course, the authorized representative would be dismissed from that position.)

However, the political accountability of the authorized representatives before the President of the Russian Federation has not prevented them from being placed in a subordinate position, as federal state employees, under the Leader of the Administration of the President of the Russian Federation. It is the latter, which establishes procedures for, and the form of, interaction of the authorized representatives with their staff. Thus, the authorized representatives answer to two masters, who may send conflicting "messages".

Furthermore, while the functions of the authorized representatives may seem at first glance to be entirely appropriate and in no way to conceal any potential for diminishing the powers of subjects of the Russian Federation, a closer look shows that this is not at all the case. Consider, for example, that the authorized representative of the President is to approve draft resolutions by federal agencies that touch on the interests of the federal okrug or of a subject of the Russian Federation located within the bounds of the federal okrug. Of course, that the authorized representative of the President carries out such a task does not exclude the possibility that the interested subjects of the Russian Federation will conduct their own assessment of draft resolutions. After all, the obligation of the Russian Federation to send such drafts to interested subjects of the Russian Federation for assessment is, in a number of cases, directly stipulated by federal legislation. Nevertheless, the requirement for the approval of draft resolutions by the authorized representative has a number of quite significant legal consequences.

First, it should be recalled that the authorized representatives belong to the Administration of the President of the Russian Federation, and represent

the latter within the borders of the federal okrug. Yet it is well known that the President of the Russian Federation is himself not beholden to any branch of government in Russia: he acts as an arbiter among them, and ensures the coordination of their functions. Thus, in the case under consideration, the situation is such that the federal agency of executive authority cannot adopt a resolution with regard to an interested subject of the Russian Federation, even if the latter agrees to the resolution, unless it receives the approval of the authorized representative. In other words, in relation to the federal executive authorities and the state authorities of the interested subject of the Russian Federation there intrudes a completely foreign element, i.e. the authorized representative of the President, the purpose of which is merely to ensure coordination of the functions of bodies of state authority on both federal and regional levels.

Second, it is somewhat difficult to reconcile coordination of the functions of state authorities on the federal and regional level, which is, generally speaking the role of the authorized representatives, with approval of draft resolutions of federal executive authorities in relation to interested subjects of the Russian Federation. Coordination of functions can be ensured only by the right of the authorized representative to consultative participation at the stage during which the subject of the Russian Federation makes its decision on the consequences of the resolution for it. Moreover, the set of procedures, which has been designed to ensure the coordination of functions, includes a process for reaching agreement in case of discord between agencies of state authority on different levels. So, the requirement that the authorized representative approve drafts of concrete resolutions by federal executive authorities seems somewhat inconsistent with the coordination function.

Third, in a number of cases the requirement for such approval on the part of the authorized representative clearly (albeit, in practically every case, indirectly) limits the opportunity of the interested subject of the Russian Federation to come to its own conclusions about the resolution being adopted by the federal executive authority. Here we have a clear-cut example of the effective diminution of the sphere of powers of interested subjects of the Russian Federation with regard to their participation in the law-making activity of federal agencies of executive authority.

Furthermore, the function of the authorized representatives that has been examined here is only one of several listed in the decree of the President of the Russian Federation that are also by their nature fundamentally uncharacteristic of Russian presidential authority. Unfortunately, it is impossible to investigate them all in the present article. Further examination of these issues must await another opportunity.

In conclusion, it may be useful to comment on the evolving status of the federal okrugs. According to the text of a decree of the President of the Russian Federation, a certain function of the authorized representative is called into play when a draft resolution touches on the interests of the "federal okrug or a subject of the Russian Federation located within its borders." Evidently, from the word order of the text, primary consideration is to be given to the interests of the federal okrug, and the interests of the subject of the Russian Federation located within its borders figure only secondarily. It follows, then, that the federal okrug is by no means merely an abstract, legal construct with conventional borders that set territorial limits on the actions of the authorized representative. Rather, it is a type of subject of federal relations with a status that has not yet been entirely defined, but with interests that are already being taken into consideration. A similar example is that of a norm adopted by a resolution of the Government of the Russian Federation:

> " It is to be considered expedient to: invite the authorized representatives of the President of the Russian Federation in the federal okrugs . . . to attend sittings of the Government of the Russian Federation, with the right to a deliberative vote, … held … on issues involving the interests of the appropriate federal okrugs."[6]

Although, the constitutional status of the federal okrugs has not yet been fully determined, certain tendencies have appeared that testify to a potential in the near future for the:

- Diminution of the political independence of the currently existing subjects of the Russian Federation;
- Formation of new, enlarged subjects of the Russian Federation on the basis of the federal okrugs, and the construction of a symmetrical [as between the center and the regions] federation based on a territorial approach;
- Organization of systems of administration in the former subjects of the Russian Federation possessing the status of low-level, local elements

of centralized state administration, with a retention of local self-government in municipal formations.

Although the evidence to date suggests development in such directions, the possibility exists that instead of a centralized, symmetrical federation, founded on a territorial approach, a unitary state will be created, with power strongly concentrated in the Federation government. Only time will bring clarity to this issue.

Notes

1. Agreements of this type are made in the name of Russia as a federal state, and by a subject of the Russian Federation as a territorial formation within its territory.
2. Diplomaticheskii vestnik, Nos. 5-6 (Moscow: 1994) at 56.
3. Editor's note: Two years ago, President Putin appointed seven people to be his Authorized Representatives in a new level of political entity – the federal region, or federal okrug. Seven such okrugs were created, although it may be more accurate to say they were restored, since these regions had featured earlier in Russian political history. This move was widely understood as an attempt to exert greater control by the central government powers over the 89 regions, some of which had, in a variety of ways, rather blatantly ignored Federation level authorities.
4. I.A. Sarycheva, "Sozdanie federal'nykh okrugov kak faktor ukrepleniia ispolnitel'noi vlasti v Rossiiskoi Federatsii", Reforma vlasti v Rossii: sostoianie, problemy, perspektivy (Materialy nauchno-prakticheskogo seminara) (Barnaul: Izd-vo Ataiskogo gos. un-ta, 2001) at 46.
5. Such an opinion was expressed by I.G. Machul'skaia in the context of a discussion at the scientific and practical seminar "Problems of the Delimitation of Areas of Jurisdiction and Powers between Different Levels of Authority in the Russian Federation," held on 17-19 October 2001 in the city of Barnaul. Since when the present work was being prepared the collection of materials from this conference had not yet been published, the author was unable to cite a specific published source for this opinion of I.G. Machul'skaia.
6. Resolution of the Government of the Russian Federation No. 592 of August 12, 2000 "On the interaction of the Government of the Russian Federation and federal agencies of executive authority with the authorized representatives of the President of the Russian Federation in the federal okrugs, and on the plan for allocating territorial agencies of federal agencies of executive authority," Sobranie zakonodatel'stva RF, 21.08.2000, No. 34, Article 3473.

RECENT DEVELOPMENTS IN CANADIAN OIL AND GAS LAW

Nigel Bankes ♦♦♦

Production of accounting and taxation records

Where P alleges that D has wrongfully produced a well and claims as an element of damages the difference between the price that D obtained for the gas and the price at which P would have been willing to sell the gas, D, as part of discoveries, is entitled to require P to produce all its accounting and taxation records for the relevant period because part of P's claim is that it would only have produced at a different price. What would that price have been? P itself at one point had stopped producing the subject well. Questions as to the reasons why P did not produce the subject well and tending to show that P had abandoned that well are relevant and material. Richard J. Churchill Limited v. Westhill Resources Limited, [2002] A.B.Q.B. 189 (M.C.).

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Parties cannot avoid gas broker's commission by accord and satisfaction

In Pure Energy Marketing Ltd. v. Ramarro Resources Inc., [2002] A.J. 578, A.B.Q.B. 342, Pure put together a deal involving R an Alberta producer and KCS. The parties entered into a tripartite agreement confirming that R would pay Pure a fee of $0.04 per GJ "of gas delivered under the contract or extension thereof" and later R and KCS executed a bilateral gas sales contract. The contract initially had a 15-year term and an arbitration clause. R and KCS amended this agreement some years later to provide two opportunities for price redetermination failing which either party might give notice to terminate effective on a fixed date in the future. KCS availed itself of this option and the contract was terminated. Contemporaneously, KCS and R agreed to bring forward the effective termination date in return for a one time payment from KCS to R. Pure claimed an entitlement to its commission on sales that would occurred but for the termination.

Justice Cairns held that Pure was not entitled to a commission based upon the full 15-year term of the contract because the parties did contemplate the possibility of amendments. However, Pure was entitled to a commission on the gas that would have been delivered but for the accord and satisfaction that saw the effective termination date being brought forward. The court reasoned that Pure was an agent and there is a rule of agency law to the effect that where an agent has done all that is required, the agent is entitled to its commission where the principal undermines that entitlement by its actions and that term should be implied into the contract in the interests of business efficacy and based on the officious bystander test. The rule was equally applicable to the current facts. The court relied upon agency rules and not the concept of unjust enrichment because it was clear law that Pure could not make a *quantum meruit* claim where there is an express contract between the parties.

What is the duration of a processing agreement?

That was the question faced by Justice Hawco in Depar Management Limited v. Piute Petroleums Ltd., [2002] A.B.Q.B. 525 on a highly idiosyncratic set of facts which involved an action commenced in 1985 finally coming to trial and judgement in 2002 by which time the key players for Piute were dead or incapacitated. DM acted as Alberta agent for Piute until 1985. In a side deal letter agreement DM also earned a 50% interest in one of Piute's wells, the 2B2 well; DM also alleged that there was a collateral contract to this earning agreement pursuant to which DM could process its oil at a battery which Piute was to build at its expense and for which fees would be allocated on a per well basis rather than a volumetric basis. Since the 2B2 turned out to be Piute's best producer this formula redounded to the benefit of DM. When Piute assumed control of its own operations in 1985 it changed the cost allocation formula to a volumetric formula. DM claimed breach of contract and Piute claimed for breach of duties owed by DM as agent/operator prior to 1985.

Justice Hawco dismissed both claims. He held that while DM had established the existence of the collateral processing agreement DM and while this might be a continuing commitment to provide DM with access to the battery, DM had been unable to establish that fees would always be allocated on a per well basis. As to the counterclaim, notwithstanding DM's own acknowledgement that a per well allocation was inconsistent with practice in the industry and notwithstanding Hawco's characterization of M as an agent/trustee with a duty to fully inform the owners of the normal or usual practice and the benefits that he was receiving through that practice, Justice Hawco held that there was no breach of duty by DM. The practice followed by DM was unusual here but that did not make it inappropriate. But if Hawco's premises are correct (DM a full-blown trustee and by its own admission following a practice that departs from the industry norm) is there not a *prima facie* case of liability simply on the basis that a trustee should take that care of the trust property as a reasonable person would take of their own property: Fales v. Canada Permanent Trust Co., [1977] 2 S.C.R. 302?

No arguable grounds for leave to appeal EUB decision

The EUB had granted PC's application for reduced spacing units and the establishment of a holding on part of the lands the subject of PC's application, deferring until later consideration of PC's application as it pertained to BF's land. In Bruce Farms Ltd. v. Alberta (Energy and Utilities Board), [2002] A.B.C.A. 77 Justice Paperny (in chambers) denied leave to appeal. In reaching that conclusion Justice Paperny

held that neither of the grounds adduced by BF raised seriously arguable points of law. First, it was not open to BF to argue that just because the EUB had decided part of the application one way that it had fettered its discretion in relation to the balance of the application. Second, BF could not argue that the EUB had erred by failing to require the applicant to provide information stipulated by the EUB's own regulations. In fact, PC's original application had been supplemented by additional information and community meetings and furthermore, insofar as BF's claim engaged the interpretation of section 15.160 of the OGCRs (this section prescribes the information requirements for reduced DSUs), this was clearly a matter within the jurisdiction of the EUB and as to which it was entitled to a high degree of curial deference and therefore as to which it could not be said that there was a seriously arguable case.

Adequacy of caveat and certainty of royalty terms

Over the last decade or so Alberta courts have taken a fairly relaxed attitude to the rule of section 131 of the Land Titles Act to the effect that a caveat must state "the nature of the interest claimed". The trend of distinguishing the Supreme Court of Canada's decision in Ruptash v. Zawick, [1956] S.C.R. 347 began with Calford v. Zellers, [1972] 5 W.W.R. 714 and continued with Canadian Superior Oil v. Worldwide Oil and Gas, [1990] 3 W.W.R. 511 and Carruthers v. Tioga Holdings Ltd. (1999), 171 D.L.R. (4th) 507. The decision of the Manitoba Court of Queen's Bench in National Trust Co. v. Johnson, [2002] M.J. 189 shows that there are still limits to that relaxed approach. The case involved an instrument described as a Royalty and Mineral Trust Agreement (RMTA) in which the owner of the mineral estate set over a gross royalty reserved by a pre-existing lease to the trustee but also transferred an undivided interest in the minerals to the trustee. The caveat filed by NT Co. to protect the RMTA referred to the agreement to transfer the undivided interest but it did not refer to the royalty interest. Accordingly, the court held that the caveat did not protect the royalty interest. The court also went to hold that even had the caveat protected the royalty, the royalty would have been unenforceable because the original lease had been lost and it was therefore not possible to ascertain in respect of which substances the royalty might have been payable. It is perhaps important to emphasise that the parties did not present evidence as to the standard form used by Canadian Superior (the relevant company) in that part of Manitoba at the time. By contrast, in Guaranty Trust v. Hetherington (1987), 50 Alta. L.R. (2d) 193 at 199 (Q.B., 67 Alta. L.R. (2d) 290 (C.A.)) certain concessions were made as to the contents of the lost Rio Bravo leases which underlay the GRTA.

I think that the decision is correct on the caveat point and should be followed in Alberta. Note that the GRTA Test Cases litigation (Scurry Rainbow v. Burden (1993), 8 Alta. L.R. (3d) 225, aff'd (1994), 23 Alta. L.R. (3d) 193) demonstrated that at least some of the standard forms in use in Alberta used to transfer both a royalty interest and an undivided interest (the forms are reproduced in the A.R. version of the judgement at 138 A.R. 179); but it should also follow from this case that a caveat that protects only a royalty interest will not protect the undivided interest. One cannot help but think that the mineral owner's victory in this case not prove to a resounding victory since the transfer of the undivided interest did survive and was clearly protect by the caveat and unaffected by the certainty arguments. To illustrate, suppose that the mineral owner had granted a lease of the oil and gas rights to X who failed to secure a similar lease from NT Co. Basic co-ownership law would dictate that the mineral owner would have a duty to account to NT Co. for more than the just share received.

Implications of a *de facto* pipeline corridor

In the early 1970s when the tar sands were first being developed, the provincial government apparently contemplated the creation of an energy utility corridor to bring the product south for further refining. Such a corridor would have resulted in a fee simple acquisition of the relevant lands. The proposal never came to fruition but pipelines were constructed and the result was a *de facto* pipeline corridor. Fast forward a few years and the aptly named Corridor pipeline was proposing yet another "dual" pipeline system (diluent in one pipe and diluted bitumen in the other) from Albion Sands to a heavy oil upgrader near Scotford. There were approximately 85 parcels of land involved and agreements were reached with about 55 owners. The remaining owners sought to have compensation determined by the SRB. The SRB:

1 declined to treat the voluntary agreements as a pattern of dealings,

2 awarded compensation at the rate of $1,000 per acre, with $500 per acre for temporary working rights, and

3 declined to make an award of annual payments.

Both parties appealed.

In Zubick v. Corridor Pipeline Limited, [2002] A.B.Q.B. 452 Justice Sanderman allowed the landowners' appeal in part and increased the compensation payable and offered some interesting observations on a couple of points. First, the Court held that it was appropriate for the Board to reject the claim that there was evidence of a pattern of dealings. A significant number of owners had refused to enter into a voluntary agreement and the voluntary agreements were subject to the rider that Corridor would increase the compensation payable under those voluntary agreements in the event that the Board made a higher award.

Second, the Court also confirmed the Board's decision to deny an annual payment. Although there was evidence that the route followed by the pipeline had become a *de facto* pipeline corridor already used by some pipelines and likely to be used in the future by others, that was not grounds for an annual payment although it might be grounds for increasing the one-time payment. The Board had given good and appropriate reasons for rejecting the annual payment:

1 why should this operator make an annual payment when existing operators had not;

2 what would be the effect for future operators within the "corridor", and

3 while a *de facto* corridor designation was significant, was it more significant than the impact of a sour gas pipeline with prescribed setback distances?

Third, in light of the above which made the case unique, it was appropriate to increase the one time payment to $1,200 per acre relying in particular upon the discretionary "other factors" heading of subsection 25(1). In reaching this conclusion Justice Sanderman said all the right things in noting that while the SRA provided for a hearing de novo the Court still owed a duty of deference but it is hard to see how this deference played out in his reasoning. True, the Court did reject claims that the payment should be higher still on the reasonable grounds that it is illogical for the operator to pay more for the taking of one right from the owner than it would have to pay to purchase the entire fee simple but in deciding to increase the compensation by $200 per acre Justice Sanderson can do little more than suggest that this is "appropriate". In the absence of some more convincing reasoning is the Court not running the risk that we will be back to where we were a few years ago with the SRB being a mere "stalking horse" for the Court, and landowners seeing nothing to lose from re-running the hearing before the Board?

Fourth, and somewhat ironically, the Court described as "unprincipled" the practice of fixing the value of temporary working rights at the rate of 50% of the right of way payments. The court indicated that this was unsupportable and would have reduced the award of $500 per acre for temporary working rights but for the fact that no evidence had been led that would allow a principled calculation of an appropriate award. Certainly the Court was not about to increase the cost of the working rights to keep track with the increase in the main award.

Court of Appeal affirms phase severance decision

The Court of Appeal in a short memorandum of judgement substantially affirmed Justice Fruman's decision at trial in Anderson v. Amoco Canada Oil and Gas, [2002] A.B.C.A. 162. The Court agreed that:

1 it is settled law in Canada that ownership of severed titles to petroleum and natural gas is not to be determined at surface temperature and pressure conditions,

2 the decision of the Privy Council in Borys v. CPR (1953), 7 W.W.R. 546 and followed by the Court of Appeal in Prism v. Omega, [1994] 6 W.W.R. 585 constituted a complete answer to the appellant gas owners' position.

Those two decisions held that the relevant time for determining ownership of petroleum and natural gas was at the time the severed titles were created which in this case meant original reservoir conditions. The Court reversed Fruman's holding on gas dissolved in connate water. Justice Fruman had awarded this gas to the petroleum owner reasoning that petroleum and water were both liquids and just as solution gas belonged to the petroleum owner (a matter decided by Borys) so should gas dissolved in connate water. The

Court rejected that analogy effectively ruling that the logical chain was broken at the first link: “The reservation [‘of all coal, petroleum and valuable stone which may be found to exist in upon or under said lands’] did not reserve water. Therefore, gas which was in solution within connate water at initial reservoir conditions does not belong to the petroleum owner.”

In reaching its decision the Court emphasised a couple of points that did not emerge quite as clearly in the trial decision. First, the Court emphasised that in Borys the facts revealed that while there was no production from the subject lands at the time of the litigation (because of the injunction that had been granted to prevent drilling) there was ongoing production from the Leduc-Woodbend field from other wells. That fact however did not change the conclusion that ownership should be determined according to original reservoir conditions. Second, Fruman had not erred by failing to construe the conditional “be found to exist” language of the reservation as supporting the gas owners’ claim that ownership could only be determined from time to time as gas was reduced to notional possession when it entered the well bore: “At the time the CPR reservation was created, it was not known if petroleum existed below the surface of the land. Therefore the reservation would only attach to petroleum which might be found to exist through exploration or production. These words merely express a limitation on the operation of the reservation. Those words do not mean that the petroleum must be reduced to possession before it can be subject to ownership.”

At trial, Justice Fruman had held that while the Rule of Capture applied as between tracts it did not apply across phases. The implication of this of course is that a petroleum owner cannot acquire the gas owner’s gas by reducing it to possession. What then is the relationship between the two owners and, in particular, what duties (if any) are owed to gas owners by petroleum owners? On these points the Court of Appeal’s decision offers some clarification but other issues are still outstanding. Certainly, the Court has affirmed the decision in Borys that the petroleum owner’s implied right to work includes the right to use the gas owner’s gas as a necessary part of the process. Indeed, the Court of Appeal’s formulation of this point actually seems to be wider (and unnecessarily so) than the Borys formulations: “Parlee, J.A. [Court of Appeal in Borys] held that the reservation necessarily included the right to produce petroleum and that the CPR could produce the petroleum even if it interfered with and wasted Borys’ gas so long as modern operating methods were employed.”

Here are some of the outstanding questions. The rule of capture is a “no liability” rule. If the rule does not apply as between phase owners what is the correct characterization of the duty owed by the petroleum owner to the vulnerable gas owner? Does the duty sound in tort (it cannot be trespass because of the implied right to work, but may there be a negligence based duty of care even if nuisance based duties are not available)? Or does it sound in the law of fiduciary relations (while the categories of fiduciary duties are never closed (per Dickson in Guerin) and there is the classic hallmark of vulnerability, the resulting duty of undivided loyalty is hardly consistent with the broad right to work articulated by the Privy Council and by the Court of Appeal). If there are tort-based duties, who has the onus? Ordinarily that will be the plaintiff gas owner but the petroleum owner will possess all the information and therefore be able to perform initial gas in place calculations. Does the petroleum owner have a duty to perform that calculation? Is there a point at which the onus should shift to the petroleum owner for it to demonstrate that its actions are not in accord with good operating procedure? Might this happen where there is flaring? Or where gas/oil ratios reach a particular point? If the gas owner’s gas is being saved, produced and marketed does the petroleum owner have a duty to account?

In my view neither Fruman nor the Court of Appeal gives us much guidance on these issues and thus, while the gas owners will undoubtedly try and appeal on to the Supreme Court of Canada if they can raise the funds, there will still be a series of questions that will need to be answered even if this judgement ends this particular round of the litigation.

A note on three UK oil and gas unitization cases

In common with other jurisdictions world wide there is considerable pressure on operators in the UK sector of the North Sea to unitize shared structures at a relatively early stage in their development. Pressure is asserted through the Model Clauses for the UK licences which gives the Minister the authority to force unitize if necessary (see clause 25, Petroleum (Current Model Clauses Order) of 1999[1]), but is also asserted through the licensee’s need to secure the approval of the Department of Trade and Industry for any field development programmes. As a matter of

policy (see subsection 2.5.1 of the Guidance Notes on Procedures for Regulating Offshore Oil and Gas Field Developments issued by the Oil and Gas Directorate of the UK Department of Trade and Industry[2]) DTI has indicated that in circumstances where a field extends into an area covered by a neighbouring licence it will need to be assured that the proposed programme is optimum and that there will be no risk of unnecessary competitive drilling. A unitization agreement is one mechanism for reassuring DTI on this point.

One consequence of early unitization is that the parties will frequently be uncomfortable with negotiating tract participation factors which will remain constant over the life of the field as more data is collected through developmental drilling and continued production. Hence UK unitization agreements frequently provide for periodic re-determination over the life of the pool. Such re-determinations have retrospective effect: i.e., tract participations (entitlement to proceeds of production and costs) are re-calculated *ab initio* with provision for re-balancing respective takes.

Not surprisingly, the re-determination process is hotly contested and considerable thought has been devoted to facilitating the re-negotiation process through the use of experts. But efforts to avoid litigation have not been completely successful as the following four cases illustrate: Arco British Ltd. v. Sun Oil Britain Ltd., (unreported transcript of decision of the Court of Appeal of England (December 14, 1988) available on LEXIS), Amoco (UK) Exploration Co. v. Amerada Hess, [1994] 1 Lloyds Law Reports 330 (Ch. D) (the Scott Oil Field), Neste Production Ltd. v. Shell UK Ltd., [1994] 1 Lloyds Law Reports 447 (Ch. D) (the Nelson Field) and Shell UK Ltd. v. Enterprise Oil, [1999] 2 Lloyds Law Reports 456 (Ch. D.) (the Nelson Field).

In Arco British Ltd. v. Sun Oil Britain Ltd., (unreported transcript of decision of the Court of Appeal of England (December 14, 1988) available on LEXIS) the dispute involved the Balmoral Oil Field and the proper interpretation of a clause in the agreement relevant to the redetermination of tract participation rates. The retrospective effect of the redetermination was particularly significant here since the project had not been a success and therefore a greater allocation on the redetermination would actually result in the "successful" party having to bear a greater share of the losses. The dispute revolved around the method for ascertaining the detailed form and shape of the uppermost formation of the field. The parties agreed that, unencumbered by the contractual stipulations of an agreement, an expert would proceed to do this by trying to marry the data from wells drilled into the pool with the available seismic data. The expert testimony also suggested that while particular credence should be given to the well data, such data would not be regarded as controlling and might be adjusted in particular cases to get the best overall fit. In previous work all the parties had regarded well data as controlling but in this instance the expert retained by the parties to assist in the re-determination procedure had not regarded the well data as immutably fixed.

The question at issue for the Court of Appeal was whether or not the unitization agreement had, notwithstanding customary practice and the approach of the expert in this case, stipulated that the well data was to be regard as controlling in the interests of achieving greater certainty. The trial judge rejected that proposition as did a majority of the members of the Court of Appeal. The court took the view that neither interpretive approach was unreasonable and even the dissent took the view that in a situation where the expert practice was to do X, the agreement should require clear language before admitting of the conclusion that the agreement required Y. While the agreement provided for the use of a technical expert to assist in the re-determination procedure it does not seem to have provided for arbitration of interpretive disputes. There was a choice of law clause (the agreement was to be "governed by and construed in accordance with the laws of England") and Lord Justice Wolfe construed that as a submission to the jurisdiction of the High Court. Accordingly the issue seems to have come before the court not an application to review the reasonableness of the expert's determination (there is therefore no discussion of the appropriate degree of deference to be owed) but rather as a case of first impression.

In the Amoco case (which recites that there had actually been earlier litigation in 1988 and 1989 with respect to the same field and set of agreements) one of the licensee's raised a question as to whether there was a limit to the type or categories of information that could be provided to an expert as part of an expert facilitated re-determination of tract participations. The request for judicial determination of this question was met by an application for a stay on the basis that the parties had agreed that no legal proceedings should be brought in respect of any matters in dispute which might be referred to the expert. The request for a stay was granted with Justice Morritt observing that the parties obviously intended to limit the role of the courts to intervene only in cases of fraud or manifest

error and then only at the end of the entire process. In the Neste Case a question arose as to whether or not the parties in the course of their negotiations had effected an amendment to the procedure to be followed in determining the configuration of the unit area. One group of licensees thought that an amendment had been effected and therefore sought an injunction to restrain the expert from tendering its final report on the grounds that it had not taken account of the amendment. Although the court found that the amendment had not been agreed probably more important is the court's decision that this question was a matter for the court to determine and not an issue for the expert. The Amoco Case was distinguished on several grounds including the ground that in the current case there was no common undertaking not to resort to the courts during the process.

In the most recent Shell/Enterprise case the expert procedure had pretty much run its course when one of the parties, Enterprise, noted that the expert had failed to use an agreed computer programme for mapping the unitized structure. The court ruled that the agreement was clear on this point and that the choice of program was therefore not a matter for the expert's judgement. Furthermore, the failure to use the agreed programme was material and Enterprise was not estopped from raising the issue at a late stage. As a matter of law the court therefore upheld Enterprise's contention that the expert's decision was not a final decision binding the parties. Judging from the law report the case took seven days of trial time and the result of course was to set at nought the re-determination procedure which had been underway for months involving groups of technical experts for both groups of licensees as well as the consultant experts. In that sense there is an analogy with an earlier Australian unitization arbitration: Crusader Resources NL v. Santos Ltd. (1991), 58 S.A.S.R. 74 (Full Ct.). Involved here was a prospective tract participation re-determination for the Cooper Basin Gas fields. The agreement laid out a number of steps one of the earliest of which was to have a joint technical committee agree on a set of data inputs. After the technical committee had met, one of Santos' employees made some changes to the data set which was then sent out for approval without disclosing the changes. Crusader and others did not pick up on the changes and the tract re-determination procedure went ahead. One of the issues for the court was whether or not Crusader, who objected to the outcome of the re-determination, could commence an action or whether they were forced to proceed by way of arbitration. Overturning the judgement at trial the Full Court held that the arbitration clause did not apply. The redetermination procedure was a nullity since one of the foundational steps for the redetermination was absent.

In sum, the re-determination of tract participations is fraught with difficulty. While efforts have been made to insulate the process from judicial intervention it is clear that creative counsel may still be able to frame the issues in such a manner as to persuade the courts to intervene. It is true that tract participation factors will always be difficult to negotiate and we are certainly familiar with this in many North American jurisdiction with small tracts and multiple ownership interests, but these negotiations are facilitated at the outset by the prospect that unitization will make the pie bigger for all. This is not the case for re-determinations of tract participations. These are examples of robbing Peter to pay Paul – zero sum games.

By contrast with the situation in the North Sea there has been very little litigation in the Canadian courts on unitization issues over the years. There are no doubt many reasons for this but key among them must be that:

1. unitization will usually if not invariably[3] occur far later in the development of a pool than in the North Sea and,

2. Canadian practice as reflected in both the 1972 Mines Ministers standard form and the more recent PJVA form is to reject outright any possibility of retrospective adjustment of tract participation factors.

While the Canadian forms admit of the possibility of extending the area of the unit, existing tract participation rates are held constant as between the original parties. Such unitization litigation as there has been in Canada has therefore not had to deal with re-determination of tract allocations but has instead considered issues such as compulsory unitization schemes (in Saskatchewan, Gladstone Petroleums Ltd. v. Husky Oil (Alberta) Ltd., [1982] 6 W.W.R. 577), the extension of units (Canadian Delhi Oil Ltd. v. Alminex Limited et al. (1967), 62 W.W.R. 513 (Alta. App. Div.), aff'd [1968] S.C.R. 775), the law of caveats (Esso Resources Canada Ltd. v. Pacific Cassiar, [1986] 4 W.W.R. 385, Canadian Superior v. World Wide Oil and Gas, [1990] 3 W.W.R. 511), split titles (Prism v. Omega, [1994] 6 W.W.R. 585), lease

continuance related issues, (Voyager v. Vanguard, [1983] 5 W.W.R. 622) and the relationship between royalty obligations and unitization agreements (Home Oil Company v. Page Petroleum Ltd., [1976] 4 W.W.R. 598 (Alta. S.C.).

Notes

1. www.hmso.gov.uk/si/si1999/99016006.htm.
2. September 2000, www.og.dti.gov.uk/regulation/guidance/reg_offshore/index.htm.
3. The practice may be different in the offshore. See, for example, condition 15 of the Terra Nova Development Plan decision which provides that "The Proponent file with the Board a unit agreement and a unit operating agreement prior to initiating oil production."

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