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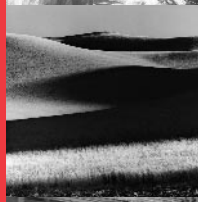
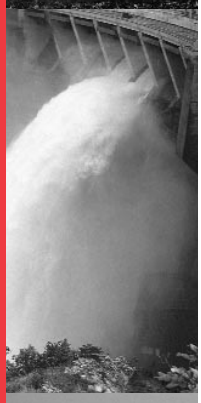

MIKISEW CREE AND THE LANDS TAKEN UP CLAUSE OF THE NUMBERED TREATIES

Article by Nigel Bankes ◆

On November 24, 2005 the Supreme Court of Canada handed down its decision in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*.[1] I think that *Mikisew Cree* is the most important decision on the numbered treaties of the prairie provinces and northern Canada (including northern Ontario) since the Privy Council's 1888 decision in *St. Catherine's Milling*.[2] The decision addresses the *procedure* by which lands within a treaty area may be moved from one category of lands (lands where the First Nation retains a treaty right to hunt) to a second category (lands where the right to hunt and carry out other traditional activities is lost). In addressing the appropriate procedure for this re-classification of lands the court shows how the duty to consult can be applied not just in the context of aboriginal rights and title but also in the context of treaties. The case emphasises, as did *Haida Nation*[3] and *Taku River*[4] in the context of aboriginal rights and title, that the duty to consult does not presuppose proof of a rights infringement. The severance of the link between proof of infringement and the duty to consult promotes the goal of reconciliation of aboriginal and settler society by establishing and emphasizing procedures that should *avoid* or *minimize* rights infringements. The case also suggests that the duty to consult will not be confined to those situations in which lands will actually be moved from one category of land to another (*i.e.* where there is, in the language of the treaty, "a taking up") but may be triggered in any situation in which a proposed regulatory decision or Crown disposition or change of land use may adversely affect a treaty right.

In assessing the impact of *Mikisew* it is important to keep in mind Alberta's arguments. On the face of it, the case engaged federal legislation and statutory discretionary powers rather than provincial laws and powers since the case involved a proposed winter road through a National Park. But Alberta chose to intervene in the case and elected to take a series of hard-line positions, all designed to minimize the legal significance of any continuing First Nation interest in their traditional hunting territories outside the boundaries of their reserves.[5] In particular, Alberta sought to argue that the Crown (whether in right of Canada or in right of the province) was free to reallocate these lands unilaterally from one category of land to another (provided that it did so for a treaty-sanctioned purpose) because that was what the treaty contemplated. The majority of the Federal Court of Appeal had accepted this argument but the unanimous Supreme Court, in a decision authored by Justice Binnie, resoundingly rejected that proposition. Thus, while the facts of *Mikisew Cree* deal with National Parks, federal legislation and winter roads, the implications of the case reach far beyond the

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RÉSUMÉ

L'auteur de ce commentaire soutient que l'arrêt de la Cour suprême *Première nation crie Mikisew c. Canada (Ministre du Patrimoine canadien)* est important pour trois raisons. En premier lieu, il confirme que les Premières nations signataires des traités numérotés conservent un intérêt dans leurs territoires traditionnels et que la Couronne provinciale ne peut pas ignorer cet intérêt. Tout en l'exprimant en termes formels comme un droit de chasse, la Cour suprême protège cet intérêt en imposant à la Couronne une obligation de consultation lors de toute allocation ou décision règlementaire qui pourrait avoir un effet préjudiciable sur la qualité ou la quantité de ce droit. Cette cause aura des répercussions non seulement sur les politiques gouvernementales d'allocation des ressources, mais aussi, et peut-être de façon plus significative, sur les activités règlementaires des ministères et des organismes de règlementation tels que l'Alberta Energy and Utilities Board. Deuxièmement, l'arrêt confirme que le droit de chasse issu du traité peut être utilisé autrement que comme défense à une accusation de prise illégale de faune ou d'autres ressources naturelles. Mikisew s'ajoute donc à l'ensemble des causes dans lesquelles les Premières nations ont utilisé le droit de chasse issu du traité comme arme pour contester des politiques d'utilisation des terres incompatibles avec leurs droits. Troisièmement, en séparant la source de l'obligation de consultation de l'atteinte aux droits, et en situant cette obligation dans l'honneur de la Couronne plutôt que dans le libellé du traité, la Cour a indiqué qu'elle est disposée à développer un ensemble de règles de common law constitutionnelles qui s'appliquera aux rapports entre les sociétés autochtone et colonisatrice, afin de promouvoir l'objectif de réconciliation qui est inscrit dans l'article 35 de la *Loi constitutionnelle de 1982*.

boundaries of Wood Buffalo National Park and other similar federal lands. Justice Binnie made this clear at the beginning of his judgement when he said this: "the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples. It goes to the heart of the relationship and concerns not only the Mikisew but other First Nations and non-aboriginal governments as well." I think that the real importance of *Mikisew Cree* will be its implications for provincial resource disposition and regulatory decisions both in Alberta and in other provinces.

This comment begins by explaining the legal source of the duty to consult and then goes on to refer to the key terms of Treaty 8 that were at issue in *Mikisew,* the hunting rights clause and its "lands taken up" proviso. From there the comment deals successively with the following issues: (1) the provincial argument that the Crown has a treaty right to take up lands and therefore no duty to consult, (2) the issue of infringement, (3) the threshold for triggering the duty to consult, (4) the content of the duty to consult in the context of the numbered treaties, (5) the treaty as the foundation of a continuing relationship, (6) treaties and fiduciary duties, and (7) the implications of Mikisew for areas subject to the Natural Resources Transfer Agreements (NRTAs).

The conceptual basis of the duty to consult in *Haida* and its threshold

Prior to the Supreme Court's decision in *Haida Nation,* the *Sparrow*[6] case seemed to offer at least some support for provincial governments to argue that they only had a duty to consult where there was an infringement of a proven section 35 protected right.[7] The Supreme Court scotched that notion in *Haida* and reformulated the conceptual basis and juridical nature of the duty to consult. The court held that the duty was based upon the honour of the Crown and should be seen as part of the project of reconciliation: (at paras. 16-17 and 32).

> The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown … [which] is not a mere incantation, but rather a core precept that finds its application in concrete practices.
>
> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims *and the implementation of treaties*, the Crown must act honourably (emphasis supplied).

> The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*.

Haida confirmed that the honour of the Crown is not simply an ethical or a political concept but a legal concept that may give rise to concrete legal obligations. But *Haida* also confirmed that the duties associated with the honour of the Crown extend to all areas of aboriginal-Crown relationships and are not confined to a single area, such as treaty law. One of the implications of this must be that the honour of the Crown is not exhausted by the terms of the treaty, however broadly interpreted,[8] or by the implementation of the terms of the treaty. Justice Binnie makes this even clearer in *Mikisew* (at para. 54) where the Court rejected the federal Crown's argument to the effect that the terms of Treaty 8 itself had exhausted any obligations that the Crown might have to consult and accommodate. That could not be the case because "Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred … in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it."

It further follows from this that if the terms of the treaty do not exhaust the legal content of the honour of the Crown then the identification of what that duty might mean in any particular case is not solely a matter of identifying and interpreting the terms, included the implied terms, of the treaty relationship: part of the content of the duty may be imposed as a matter of law, constitutional law.[9] While perhaps some of the passages in *Mikisew* suggest a search for an appropriate implied term the general tenor of the judgement is that the duty exists independently of the language of the treaty. This is apparent both from the general discussions of the objective of reconciliation and the source of the duty to consult but also more specific passages such as Binnie's comment at para. 57 to the effect that "the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 *therefore* gives rise to Mikisew procedural rights (*e.g.* consultation) as well as substantive rights (*e.g.* hunting fishing and trapping rights)."[10]

In addition to clarifying the source of the duty to consult, *Haida* also discussed when the duty to consult might arise. The *Haida* court set that threshold at a low level. The duty, the Court said (at para. 35), "arises when the Crown has knowledge, real or *constructive*, of the *potential* existence of the Aboriginal right or title and *contemplates* conduct that *might* adversely affect it" (emphasis supplied).

Treaty 8 and the context of the lands taken up clause

Mikisew Cree deals with the legal relationship between the Crown and a treaty First Nation. Although the previous paragraphs suggest that the terms of the treaty cannot exhaust the content of that relationship, the treaty terms stipulate key elements of that relationship. This case involved Treaty 8.[11] Treaty 8, in common with the other numbered treaties, begins with a series of recitals describing the Crown's purpose in entering into the treaty and the means by which the Chiefs of the various tribes to the treaty were acknowledged by them as having the authority to negotiate.

The operative clauses begin with a surrender or extinguishment clause whereby the treaty nations "DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits …". There follows a metes and bounds description of the lands (covering, as Justice Binnie acknowledges, a vast area of some 840,000 sq km, dwarfing France (at 543,998 sq km)) and then a for greater certainty clause "AND ALSO the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia, or in any other portion of the Dominion of Canada" together with an habendum: "TO HAVE AND TO HOLD the same to Her Majesty the Queen and Her successors for ever."

Immediately after the surrender clauses we find the hunting clause of the treaty:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

The clause contains two provisos, the regulatory proviso and the "lands taken up" or geographical proviso. The geographical proviso contemplates that lands may be lost to

hunting as those lands are taken up for certain purposes.[12] One of the arguments in the present case was that a winter road was not one of those permissible purposes. Justice Binnie rejected that argument and gave several reasons for thinking that the use of lands for a road was a permissible purpose.[13] He held that the term "other purposes" should not be read restrictively,[14] but, and more convincingly, he also emphasised that transportation was implicit in each of the other listed purposes while the recitals to the treaty referred to the Crown's intent to open up lands for a number of purposes including travel. Binnie concluded that this premabular reference should inform the meaning attributed to "other purposes" in the hunting clause.

The government's "right" to take up lands

As noted in the introduction, Alberta argued before both the Court of Appeal and the Supreme Court of Canada that since Treaty 8 expressly contemplated the "taking up" of surrendered lands for various purposes, including roads, the proposed winter road was an implementation rather than an infringement of the treaty and therefore could hardly trigger Crown obligations. Binnie rejected both the province's position and the Federal Court of Appeal's decision stating (at para. 44) that he could not agree with this "implied rejection of the Mikisew procedural rights" because he thought it was inconsistent with *Haida Nation* and *Taku River*. In his view the duty to consult was triggered because the proposed road would "reduce the territory over which the Mikisew would be able to exercise their Treaty 8 rights" and adversely affect existing hunting and trapping rights. The road would affect both the quantity of the treaty rights and the quality of those rights (the road would fragment habitat, disrupt migration patterns, and lead to increased poaching). Justice Binnie also rejected arguments to the effect that there could be no duty to consult if a taking up did not substantially reduce the area over which hunting activities might be continued or if the Mikisew would still be able to hunt in a different part of Treaty 8 territory, or even elsewhere within the province.[15] For Justice Binnie, both arguments ignored the assurances of continuity that were made when Treaty 8 was negotiated (at para. 47). "Location is important" and "Continuity respects traditional patterns of activity and occupation".

These passages confirm that the duty to consult in the context of a taking up does not depend upon the language of the treaty.[16] In other words I do not think that the court has implied a term into the treaty as much as it has stipulated that the recognition, affirmation and reconciliation of existing aboriginal and treaty rights, and the honour of the Crown, requires the court to impose a duty to consult.[17]

Infringement

Justice Binnie did not accept the argument that every taking up of lands should be viewed as an infringement of the treaty right. While this view had apparently been adopted by the trial judge in *Mikisew* and by at least one member of the British Columbia Court of Appeal in *Halfway River*,[18] it was not, in Binnie's view, an interpretation that the language of the treaty could support. The treaty did contemplate change, it did contemplate that lands could be moved from one category to another, and this was a shared understanding[19] of both parties to the treaty (at para. 30). But even if the treaty afforded the Crown the right or power to take up lands, the Crown still has an obligation to manage change, and the movement of land from one category to another, honourably.

It does not follow from this that Binnie believes that a taking up, or a series of takings up, could never amount to a treaty infringement. Indeed, Justice Binnie seems to accept (at para. 44) Justice Rothstein's proposition (from the majority decision in the Court of Appeal) that there might be an infringement where lands are taken up in bad faith, or where so much land has been taken up that no meaningful right to hunt remains.[20] This emerges more clearly later in his judgement (at para. 48) where he makes the point that the "meaningful right to hunt" must respect location:

> The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.

In sum, two propositions flow from this part of the judgement. First, the Crown owes duties to treaty First Nations in addition to those that might flow from an infringement of a treaty right. These duties are procedural in nature and are embraced by the duty to consult. Second, in some circumstances, the actions of the Crown in taking up lands may actually constitute an infringement of the treaty.

What will serve as a trigger to the duty to consult (and accommodate)?

So far we have established that Crown decisions to take up lands may trigger a duty to consult. The Crown cannot pretend that it has no duty. Two questions remain: (1) can we be more precise about when the duty to consult might be triggered in the context of the numbered treaties, and (2) what can we say about the content of the duty?

As to the first, Justice Binnie correctly emphasised (at paras. 34 and 55) that *Haida Nation* and *Taku River* established a low threshold for triggering the duty to consult. He also emphasised, as had the court in these earlier cases, that the Crown would not be permitted to hide behind the administrative inconvenience associated with having to consult on numerous decisions that might give rise to a taking up (at 50). This did not mean (at para. 55) that "whenever a government proposes to do anything in the Treaty 8 surrendered lands that it must consult with all signatory First Nations no matter how remote or insubstantial the impact." But that was not this case since here "the impacts were clear, established and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question."

But what is it that serves to trigger? Will there only be a duty to consult where the result of the Crown's decision will be to move lands from one treaty category to another? Or might the duty also be triggered by decisions or activities that fall short of this but which nevertheless may have an adverse effect on the quality or quantity of the right to hunt? While some of Justice Binnie's language (and especially his references to the two categories of treaty lands) perhaps support the former interpretation I think that there are several reasons for thinking that the second interpretation is to be preferred. First, I think that this broader approach is more consistent with the low threshold that *Haida* fixes for the duty to consult and more consistent with the court's severance of the duty to consult from a finding of infringement. Second, I think that the broader approach is more consistent with Binnie's appreciation of the nature of the impacts of this project for the Mikisew people. It is quite apparent that Binnie's concerns (at paras. 44 and 15) went far beyond the reduced territory of the lands that were actually to be taken up (the road itself and the no-hunting corridor) since the road would "injuriously affect the exercise of these rights". These effects would include changes to the pattern of wildlife movements. Justice Binnie went on to refer with apparent approval to a draft environmental assessment report to the effect that the:

> road could potentially result in a diminution in quantity of the harvest of wildlife, as fewer furbearers (including fisher, muskrat, marten, wolverine and lynx) will be caught in their traps. Second, in qualitative terms, the more lucrative or rare species of furbearers may decline in population. Other potential impacts include fragmentation of wildlife habitat, disruption of migration patterns, loss of vegetation, increased poaching because of easier motor vehicle access to the area and increased wildlife mortality due to motor vehicle collisions.

All of this meant that "it is apparent that the proposed road will adversely affect the existing Mikisew hunting and trapping rights, and therefore that the 'trigger' to the duty to consult identified in *Haida Nation* is satisfied."

And finally, the broader approach is more pragmatic and less technical. It will allow the parties to focus their resources on finding practical solutions to avoid and reduce conflicts and infringements rather than arguing endlessly about whether a particular disposition, regulatory activity, or changed land use actually results in a taking up. Certainly we know from the existing case law that this will be contentious[21] but I think that the court has signalled in both *Haida* and *Mikisew* that it wishes to take a more pragmatic and less technical approach to these questions. On that basis the fact that there might have been a taking up is something that will go to the *content* of the duty to consult but it will not serve as a necessary trigger.

What is the content of the duty to consult (and accommodate)?

As to the second question, the content of the duty to consult (and accommodate) in the context of the numbered treaties, Justice Binnie emphasised that while the threshold may be low, *Haida* and *Taku* also established that the content of the duty varies (at para. 34) and is governed by context. In *Haida* the Chief Justice noted (at para. 39) that "the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed." Thus at one end of the spectrum there will be (at para. 43) "cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor" and at the other end there will be (at para. 44) "a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high." The *Haida* court also quoted with approval from

Delgamuukw to the effect that even in cases of consultation (rather than consent\veto) the "consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue."

So, how might this be applied in the context of *Mikisew*? Here, Justice Binnie suggested that (at para. 64) the Crown's duty lay "at the lower end of the spectrum" – at least in this case because while the Mikisew might have had an established treaty right to hunt (rather than the more inchoate rights contended for in *Haida* and *Taku*), the proposed project was: (1) a fairly minor winter road, (2) on *surrendered* land (the emphasis is Binnie's), and (3) in a situation where the relevant treaty rights are "expressly subject to the 'taking up' limitation."

But what did the lower end of the spectrum require in this case (at paras. 64 and 66)?

- a duty to provide notice;
- a duty to provide information about the project addressing what the Crown knew or believed to be Mikisew interests and anticipated impacts on those interests;
- the duty to solicit and listen carefully to Mikisew concerns;
- the duty to attempt to minimize adverse impact on Mikisew rights; but
- the duty did *not* afford the Mikisew a veto over the alignment of the road.

And the record was clear, the Crown had not discharged its obligations and this was not a case (see paras. 13 and 65) where the Crown had tried to do so but had been frustrated in its efforts by the refusal of the First Nation to participate; here, "consultation … never got off the ground".

Justice Binnie also endorsed (at para. 64) Justice Finch's important observations in *Halfway River* that consultation went beyond mere notice and embraced a more *positive duty of demonstrable integration* of First Nation concerns into any proposed plan of action. In this case that might have led to changes in the road alignment or construction.

Somewhat less useful in ascertaining the content of the duty to consult are Justice Binnie's observations (at para. 63) as to the distinction between treaty rights and aboriginal rights, his suggestion that the specificity of the treaty obligation is a relevant consideration, and his conclusion that if "the respective obligations are clear the parties should get on with performance". The implication here is that if the treaty obligation is specific there is no need to posit an additional duty to consult and accommodate. The difficulty with this passage is that Justice Binnie makes no effort to tie it back to his earlier observations about the source of the duty to consult. If that duty arises from the honour of the Crown and the ongoing relationship between the Crown and the First Nation and not from the particular terms of the treaty, (although it may be influenced by them) then why should we conclude that the specificity of an obligation negates the duty to consult?[22]

The treaty as *part* of a continuing relationship

One of the federal Crown's key arguments in *Mikisew Cree* was that (at para. 53), even supposing that there was a duty to consult and accommodate Treaty 8 First Nations, that duty had been fulfilled for all time in 1899 when the treaty was negotiated and in particular there could be no further duty to accommodate. The treaty terms themselves constituted the accommodation of the aboriginal interest. The premise here must be that the terms of the treaty, and especially the lands taken up clause, were self-executing and provided a complete code as to the legal relationship between the parties with respect to the surrendered lands. The court's judgement suggests that this cannot be the case and that the treaties must be viewed simply as part of a continuing relationship. This is a key theme in the judgement reflected in numerous passages in Binnie's judgement.[23]

Treaties and the law of fiduciary duties

The court, consistently with *Haida Nation*, notes that the duty to consult is grounded in the honour of the Crown "and that it is not necessary for present purposes to invoke fiduciary duties" (at para. 51). But the court offers no convincing rationale for why that statement, perhaps justifiable in *Haida Nation*, is equally applicable in a treaty context.[24] One might argue that a fiduciary analysis would strengthen the reasoning in the judgement and perhaps affect the content of the duty to consult and accommodate. For example, if vulnerability rather than a reasonable expectation of loyalty is core to a fiduciary relationship, a vulnerability analysis would confirm the extent to which the First Nations were subject to the exercise of (unilateral – at least prior to this judgement) Crown power. A First Nation is vulnerable to having the Crown move land from one category to another. An emphasis on power would also help the court get the jural relationships correct.[25] Thus it more accurate to speak of the hunting clause of the treaty as recognizing that the Crown has the *power* to take up lands (and the Mikisew the correlative liability) and not a

right (see Binnie at para. 56[26]) – or at least if the Crown has such a right that right comes as a necessary implication of the surrender clause and not because the hunting rights clause confers the entitlement.

Mikisew and the NRTAs

Mikisew did not engage the NRTA[27] so the question for present purposes is whether we might expect a different outcome where administration and control of the lands in question has been transferred to the provincial Crown by the terms of the NRTA. My conclusion is "no" for these reasons. First, the transfer is subject to "interests other than that of the province".[28] Second, if the duty to consult is based upon the honour of the Crown then, as *Haida* held, it must apply to the Crown in right of the province as it applied to the Crown in right of Canada. And third, while the NRTAs may have modified the hunting clauses of the prairie treaties (*Horseman*[29] and *Badger*) they did not extinguish the right, and, in any event, the duty to consult does not depend upon the precise language of the treaty.

Conclusions and implications

This comment has argued that *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* is an important case for three reasons. First, it confirms that the First Nation signatories to the numbered treaties have a continuing interest in their traditional territories and that the provincial Crown cannot ignore this interest. Although expressed in formal terms as a hunting right, the Court protects this interest by imposing on the Crown a duty to consult in relation to any disposition or regulatory decision that may affect the quality or quantity of that right. The case will have implications not only for Crown disposition policies but also, and perhaps more importantly, for the regulatory activities of government departments and regulatory tribunals such as the Energy and Utilities Board.[30] Second, the case confirms that the treaty right to hunt is not exhausted by its use as a defence to a charge of illegal harvesting of wildlife or other natural resources. *Mikisew* therefore adds to the body of case law[31] in which First Nations have used the treaty right to hunt as a sword to contest competing land use policies. Third, by severing the source of the duty to consult from a rights infringement, and by locating that duty in the honour of the Crown rather than the particular language of the treaty, the court has indicated its willingness to develop a body of constitutional common law to apply to the intersocietal relationship between indigenous and settler societies in order to further the objective of reconciliation enshrined in s.35 of the *Constitution Act, 1982*.

- Nigel Bankes, Professor of Law, University of Calgary, ndbankes@ucalgary.ca. I completed this comment in January 2006 while visiting at the Faculty of Law at the University of Copenhagen; I thank the Faculty there, and especially Anita Rønne, for their hospitality.

Notes:

1. 2005 S.C.C. 69.
2. *St. Catherine's Milling v. R.* (1888), 14 A.C. 46 (dealing with Treaty 3).
3. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.
4. *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550.
5. There is at least one other case, *Benoit v. Canada*, [2003] 3 C.N.L.R. 20, leave to appeal denied 2003 S.C.C.A. 387, in which the provincial Crown has taken it upon itself to intervene and argue a treaty rights case more aggressively than the federal Crown has been prepared to do and to lead archival and expert evidence in support of its position.
6. *R. v. Sparrow*, [1990] 1 S.C.R. 1025.
7. See for example *TCPL v. Beardmore*, [2000] 3 C.N.L.R. 153 (Ont. C.A.) and the summary of the provincial government's argument in *Haida Nation, supra* note 3 at paras. 28-29.
8. Consider, for example *R v. Badger*, [1996] 1 S.C.R. 771; *R. v. Marshall*, [1999] 3 S.C.R. 456 (but see the more recent and restrictive approach taken in *R. v. Marshall and Bernard*, 2005 S.C.C. 43) and *R v. Sundown*, [1999] 1 S.C.R. 393.
9. Here's a loose analogy from another area of law: the terms of the landlord and tenant relationship are sourced not only in the terms of the particular lease but may also arise in part by operation of law.
10. It is useful here to draw another analogy, this time with international treaty law, specifically Article 31(3)(c) of the Vienna Convention on the Law of Treaties which requires the interpreter of a treaty to take into account, together with the context of a treaty, "any relevant rules of international law applicable in the relations between the parties." For a useful and quite dramatic illustration of the implications of using general norms to influence the interpretation of open-textured treaty language see Belgium/Netherlands, *Iron Rhine Arbitration*, May 24, 2005, available on-line http://www.pca-cpa.org/ENGLISH/RPC/#Belgium/Netherlands. Article 31(3)(c) is one of the techniques for accommodating the interaction between treaty law and customary law.
11. For a copy of the treaty see website, http://www.ainc-inac.gc.ca/pr/trts/trty8/trty_e.htm and for other documents related to the treaty see the website of the Treaty 8 First Nations, http://www.treaty8.org/.
12. For other discussions of the lands taken up clause see Bankes "The Lands Taken Up Provision of the Prairie Treaties" in Henry Epp, ed., *Access Management: Policy to Practice, Proceedings of the Conference Presented by the Alberta Society of Professional Biologists*, Calgary, Alberta March 18-19, 2003, pp. 53-63, Calgary, ASPB, 2004; Shin Imai, "Treaty Lands and Crown Obligations: the 'tracts taken up' provision" (2001-2002) 27 Queen's L.J. 1; and Macklem, "The Impact of Treaty 9 on Natural Resource Development in Northern Ontario" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997).
13. Justice Binnie discusses this issue at two different points in his judgement *Mikisew*, *supra* note 1 at paras. 24 & 60.
14. Justice Binnie offers little authority for this proposition and his claim is surely contestable given that the clause may operate to effectively extinguish the treaty right to hunt over particular lands: see Macklem, *supra* note 12 at 125.
15. The idea that the right to hunt might be exercised anywhere within the province depends upon the modification of the treaty by the terms of the Natural Resources Transfer Agreement: *Frank v. R.*, [1978] 1 S.C.R. 95.
16. See *Mikisew supra* note 1 at para. 57: "the honour of the Crown infuses every treaty and the performance of every treaty obligation."
17. And my third analogy is to the law of constructive trusts. While express and resulting trusts flow from the express or presumed intentions of the parties the courts impose a constructive trust in order to achieve a just outcome; the equivalent here is that the court imposes a duty to consult in the treaty context to maintain the honour of the Crown.

18. *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666. This was Justice Finch's position but it was not Justice Huddart's. For Justice Huddart, the Crown had a duty to consult with respect to the issuance of a cutting permit because under the terms of the treaty lands subject to the hunting rights of the tribes were subject to shared use by the Crown and the tribes.
19. The search for an interpretation that reflects the intentions and understandings of both the Crown and the First Nation is perhaps the leading idea of treaty interpretation; *Mikisew*, *supra* note 1 at para. 28 and *R. v. Sioui*, [1990] 1 S.C.R. 1025.
20. See also Justice Southin's comment, dissenting, in *Halfway River*, *supra* note 18 to the effect that the First Nation should have proceeded by way of action in that case rather than by way of judicial review and: "The question in such an action would be whether what the Crown has done throughout the Halfway River First Nation's traditional lands by taking up land for oil and gas production, forestry, and other activities has so affected the population of game animals as to make the right of hunting illusory. 'To make the right of hunting illusory' may be the wrong test. Perhaps the right test is 'to impair substantially the right of hunting' or some other formulation of words."
21. See for example *Badger*, *supra* note 8 and *Halfway River*, *supra* note 18; see also the discussion in *Mikisew supra*, note 1 at para. 19 as to whether or not the creation of Wood Buffalo National Park effected a taking up. The arguments will be even more complex and technical where we have to deal with NRTA-modified treaty rights.
22. There may be an explanation which may be tied back to my two earlier analogies with landlord and tenant law and the international law of treaties. First, in the context of landlord and tenant law we generally say that there will be no room to imply a covenant (*e.g.* the covenant for quiet enjoyment) by operation of law where the parties have included an express covenant (whatever its content) that covers the same ground. Second, while Article 31(3)(c) of the VCLT contemplates that treaty terms should be interpreted in light of changing norms this presumption may be rebutted if the parties have chosen to use precise and technical commercial language rather than open textured terms. In other words, specificity makes it more difficult to make use of general norms to influence the interpretation of particular texts. There may be a further relevant analogy to be drawn from both systems: while both contemplate that general legal relationships (arising by operation of law) may be changed by contract\treaty both contemplate that there are limits to this freedom to contract. In landlord and tenant law these limits may arise from statute (especially in the context of residential tenancies) or the doctrine of public policy, and in the context of treaty law these may arise from the doctrine of *ius cogens* or Article 103 of the Charter of the United Nations.
23. See for example: (at para. 25) "It [Treaty 8] was seen from the beginning as an ongoing relationship that would be difficult to manage …"; (at para. 27) "none of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint. Treaty 8 signalled the advancing dawn of a period of transition"; (at para. 50) "The parties *did* in fact contemplate a difficult period of transition and sought to soften its impact as much as possible"; and (at para. 56) "In summary, the 1899 negotiations were the first step in a long journey that is unlikely to end any time soon."
24. The argument in *Haida, supra* note 3 at para. 18 was that that was a case in which "Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title."
25. For a brilliant discussion of the continuing relevance of Hohfeld's analysis of rights and liberties see Joseph Singer, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" (1982) Wisc. L. Rev. 975.
26. And see also Binnie's confused discussion of liberties and rights in *Marshall, supra* note 8 at paras. 45-48.
27. See *Mikisew, supra* note 1 at para. 43. Actually the reason that Binnie offers for not engaging the NRTA (*i.e.* that the reserve is covered by para. 10 of the NRTA) is not convincing; surely the better rationale is that the lands in question fell within a national park.
28. This is the language of s. 109 of the Constitution Act, 1867 but this language is repeated verbatim in paragraph 1 of the NRTAs: See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 175; *Haida Nation*, *supra* note 3 at paras. 58-59.
29. *R. v. Horseman*, [1990] 1 S.C.R. 901.
30. See here *Paul v. British Columbia (Forest Appeals Commission)*; [2003] 2 S.C.R. 585 but also note the unproclaimed *Administrative Procedures (Amendment) Act, 2005*, S.A. 2005, c. 4.
31. The other cases include in addition to *Halfway River*, *supra* note 18, *R v. Catarat*, [2001] 2 C.N.L.R. 158 (Sask. C.A.), (Treaty 10, Cold Lake Military Reserve, leave to appeal to the S.C.C. refused) *Liidlii Kue v. Canada*, [2000] 4 C.N.L.R. 123 (F.C.T.D.), (Treaty 11, staking of mineral claims in traditional territory); *Saanichton Marina v. Claxton* (1989), 36 B.C.L.R. (2d) 79 (B.C.C.A.), (Douglas Treaty, marina construction); *Ahyasou v. Lund,* [1998] A.J. 1157 (Q.B.), (1998), 233 A.R. 97, 15 Admin. L.R. (3d) 110 (Treaty 8, permits for geophysical operations).

A NEW DRAFT LAW ON THE SUBSOIL FOR RUSSIA: ADVANTAGES AND DISADVANTAGES

Article by Ekaterina Goudina ◆◆

Russian legislators regularly make attempts to improve the country's legislation on the subsoil.[1] Recently, a new draft of the Subsoil law was introduced to the Russian parliament[2] (hereinafter "the Draft"). The purpose of this article is to analyze some of the Draft's provisions for their possible positive or negative consequences, should they be adopted.

Positive aspects of the Draft

"Friendliness" towards the subsoil user

The Draft prepared by the Russian government and introduced for consideration by the Russian Duma[3] can, in general, be characterized as employing contractual or economic methods of subsoil use regulation, as opposed to the administrative method of regulation in the currently applicable legislation. This observation is based primarily on the proposed move from a licensing method of subsoil use to a disposition system in which the state grants rights to subsoil development by executing contracts with developers. While one cannot call the suggested disposition system *purely* contractual, the Draft introduces a framework for an economic-based relationship between the state and the subsoil user by providing 1) the opportunity to negotiate the terms of the contract for subsoil use, 2) additional means of protecting developers' interests in court, as well as 3) other contractual instruments currently not available to Russian subsoil users.

Contractual elements of subsoil use regulation

The Draft proposes, as a general rule, that rights to the subsoil be disposed of exclusively through auctions.[4] Thus, the Draft abandons the tender process, which is currently available as well as the auction. The positive aspect of this change is an increase in transparency and objectivity, as an exclusively auction-based process would apply only one, obvious criterion for determining the winner of a competition for rights – the amount of the bonus payment proposed by the participating bidders.[5]

The winner of an auction would sign a contract for subsoil use[6] (hereinafter "Contract"). The Draft provides an opportunity for the winning bidder and the state to negotiate the terms of the Contract,[7] and this clearly allows a greater degree of contractual regulation of the subsoil development process in comparison with the current system. At the same time, any freedom of contract could be significantly limited in accordance with other provisions of the Draft. Such a limitation is, in fact, to be expected. For example, the Draft provides that the Russian government may determine some of the provisions for such Contracts by developing "Standard terms and conditions for subsoil use".[8] In other words, it should be expected that a standard text of the Contract will be developed, amendment of which in individual circumstances may be quite problematic. In particular, the winner of an auction must sign the Contract within 10 days from the moment it receives the draft of it and this would seem insufficient to allow for negotiation of amendments to the standard form.

The Draft also allows for the possibility to transfer a right to subsoil development to third parties. This possibility is not generally available under the currently applicable law "On the Subsoil", which contains a short list of circumstances in which a transfer of a subsoil development license from one party to another will be permitted. These grounds are reorganization, succession, default and the like of a subsoil user.[9] According to the Draft, a right to use the subsoil can be assigned or sold. As well, the Draft allows mortgage of such a right. Some limitations are imposed on transfers of rights to use the subsoil: the new subsoil user must satisfy the requirements applicable to any subsoil users by law, as well as the requirements under which the transferable right had been originally granted (if any additional terms and conditions were declared at an auction when the field was posted). While a government regulatory authority[10] must grant its preliminary approval for such a transfer, the Draft provides an exhaustive list of grounds on which the regulating authority may withhold such approval. Thus, something of a balance between the interests of the state and subsoil users is introduced by the Draft.[11]

Subsoil use and land use

The Draft includes a section devoted to coordinating the issues of subsoil and surface land use.[12] And this is truly important, for such coordination is almost completely missing in the currently applicable body of Russian legislation. The provisions of the Draft in this regard are not wholly successful, because they do not go far enough. As well, this same section also regulates issues dealing with rights to geological information, mining equipment, and neighboring subsoil parcels. So, we see that an understanding of the importance of coordinating subsoil and surface land use issues is only just appearing in Russia.

Nevertheless, the procedure for granting right of access to the necessary surface plot stipulated in the Draft is more clear and flexible than that found in the current legislation. Similar to the current Russian law "On the Subsoil", the Draft requires that the would-be developer obtain a preliminary consent from the surface owner to grant access to the land parcel prior to receiving the rights to the subsoil.[13] However, the Draft provides greater clarity by specifying the parties to be engaged in obtaining this consent,[14] which is not done by the current law.[15] What is much more important, the Draft grants an opportunity to the surface owner to grant access to his/her land directly to the subsoil user (e.g., on the basis of a lease agreement), where under current legislation the surface parcel is withdrawn by the state from its owner (with compensation) and then granted by the state to the subsoil developer.[16] The procedure of land withdrawal remains in the Draft, but only to be used where the surface owner chooses not to enter into direct economic relations with the subsoil user.[17]

Thus, the legislator will provide, assuming that the Draft becomes law, the surface owner with an opportunity to make a choice: he/she can either enter into contractual relations directly with the subsoil user or receive compensation for the land withdrawn by the state. It can, therefore, be concluded that the suggested mechanism aims at reflecting the interests of not only the subsoil user, but also the surface owner, and this is a welcome innovation: in the currently applicable legislation surface owners are for all practical purposes excluded from decision-making processes in this sphere.

Contract for subsoil use is a real estate transaction

The Contract for subsoil use is to be executed in written form and the right to use the subsoil which arises from such a contract, is subject to registration with the Realty Registry[18] in accordance with the legislation regulating registration of real estate transactions.[19] Therefore, it is clear that the legislators view the Contract as a real estate transaction.

State registration of the Contract may present additional protection for the property interests of subsoil users: a right to immovable property which is registered with the Realty Registry may be withdrawn by the state only in accordance with a corresponding court decision,[20] while under the current legislation such a right may be withdrawn by means of an administrative (not judicial) procedure. In other words, in order to terminate the Contract before its expiry, the party initiating such early termination will need to convince a court there is good reason for early termination of the Contract. As well, the Draft provides an exhaustive list of grounds which the state may argue in such court proceedings for early termination of the executed Contract.[21] Therefore, state registration of the subsoil use right may provide an additional barrier against unconscionable behaviour by either party and may contribute to greater long-term stability of relations between the state and subsoil users.

Negative aspects of the Draft

Foreign investments limitations

The Draft introduces an opportunity for governmental authorities to limit the participation of foreign companies, or Russian companies controlled by foreign capital, in some of the auctions of rights to develop the subsoil.[22] Furthermore, the current version of the Draft does not include any legal criteria pursuant to which these powers may be exercised; the Draft only states that such limitations may be introduced for the purpose of national defense and security.[23] It is possible that further amendments to the Draft will incorporate a list of the so-called strategic subsoils or subsoil fields, rights to which will be disposed of within the framework of such limitations. Deposits of minerals, such as uranium or diamonds, unique or major fields of other subsoils, or subsoils located under lands set aside for defense purposes may receive this "strategic" status.[24] However, as of this moment, there are no such identified fields, nor any legal criteria for such limitations, and this may lead to a decrease in transparency and predictability of the subsoil rights disposition process in Russia.

Fewer opportunities for smaller companies

Another negative consequence of the current round of subsoil legislation reform in Russia is a possible decrease in business opportunities available to smaller companies, which could result from abandoning the system of tenders, in favor of exclusive reliance on auctions. The reasons would be economic: the financial capabilities of large companies are significantly greater than those available to the smaller developers, which means that the amount of bonus bid by large companies may make it impossible for the smaller companies to win rights to develop subsoils. Under the current disposition system, smaller companies could compete with the larger ones during tenders, where the solution of environmental and social issues of the region was also relevant to determination of the future subsoil developer. But under the changes proposed by the Draft disposition system, this opportunity will no longer be available.

Another negative consequence of abandoning a tender system in Russia may be a decrease in attention devoted to the so-called "difficult" subsoil fields, those which have been substantially drained already, or which are located in environmentally sensitive areas, or which are less profitable for other reasons. These were the fields which were supposed to be posted for tenders in accordance with the current law "On the Subsoil". Usually the smaller companies showed greater interest in these fields. The purpose of using the tender process for rights disposition was determination of a developer possessing the necessary technological ability and experience to develop subsoil resources in unusual or difficult circumstances or one who was interested in the social and economic development of the region. In the absence of a tender procedure, these "difficult" fields may be left without further development or rights may be granted to companies which are not capable of developing such fields, for one reason or another.

Decrease in attention paid to environmental and social issues, geological research and exploration

As was discussed above, the system of auctions in Russia is not conducive to the issuance of rights to develop the subsoil to companies most likely to be able to resolve the individual problems of a specific field or specific region. In the absence of detailed regulation of subsoil use by the state, of a complete system of environmental law, and of an effective mechanism of establishing responsibility for breaching environmental legislation, the auction system resolves only one task of all of those that a state should pursue – that is, collecting revenues. Such long-term tasks as environmental protection and social development are omitted. Thus, the Draft is in contradiction with the concept of sustainable development (which has received official recognition in Russia[25]), in accordance with which economic, environmental and social tasks of society (including within the framework of subsoil development) should be treated with equal attention.

Besides, the Draft pays very little attention to the issues of stimulating further geological research and exploration, including in difficult climate regions and on the continental shelf. These omissions also do not contribute to long-term sustainable subsoil use.

Exclusion of the regions from the decision-making process

It must be recognized that the provisions of the Draft transferring the decision-making process for rights issuance to the federal level would bring the legislation into consistency with the *de-facto* situation, which is that the subnational political units in Russia (the "subjects of the Federation") have been ousted completely from this sphere. Amendments to the law "On the Subsoil" introduced in 2004 basically terminated the so-called "two-key" principle, in accordance with which decisions on the granting of rights to subsoil users were made jointly by the federal and regional authorities. Nevertheless, exclusion of the regions from the decision-making process is noted in this article as another negative aspect of the Draft, which clearly grants the disposition authority to federal governmental agencies. Non-participation of the regions in the decision-making process may lead to a more inefficient disposition process, to less efficient subsoil development *per se*, as well as to a further decrease in the amount of attention paid to environmental and social issues in the regions.

Necessity of introduction of a large number of sub-laws

Analysis of how the current law "On the Subsoil" has worked in practice shows that many of the problems with the legislation are a result of the fact that many of its provisions require enactment of subordinate legislation for proper implementation of the statute and the necessary legal instruments have simply never been adopted. The Draft also requires enactment of a large number of bylaws (in the form of governmental decisions, etc.). If they too are not going to appear, then there is little reason to think that the Draft will much improve the existing state of affairs, even where it otherwise would have the capacity to do so.

Conclusion

This article has analyzed some of the provisions of the draft law "On the Subsoil" from the perspective of their possible positive and negative consequences. The Draft may, in general, be characterized as "subsoil-developer friendly" as it introduces contractual instruments to protect the property interests of the developing companies. The Draft also goes some way towards reflecting the interests of other impacted parties (such as surface owners, for example). As well, it introduces greater flexibility into the regulatory system applicable to subsoil development in Russia. At the same time, the Draft demonstrates a decrease in attention to environmental and social aspects of subsoil development, and may lead to fewer business opportunities for smaller companies and greater limitations on foreign participation. The currently available version of the Draft also does not sufficiently stimulate geological research and exploration activities. Hopefully, Russian legislators will consider the negative aspects of the Draft (and not only those discussed in this article) and amend the Draft as needed.[26]

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Notes:

1. The oil and gas sector is of critical importance to the Russian economy. However, although serious attempts were made to introduce a statute at the federal level specifically aimed at regulation of the activities in this sector, no such legislation has yet been enacted in Russia.
2. Draft law No. 187513-4 "On the Subsoil" (hereinafter "the Draft").
3. The Russian State Duma is the equivalent of the Canadian Parliament.
4. Para. 2, article 36 of the Draft.
5. Disposition of the subsoil through a tender procedure incorporated a complicated system of evaluation of the proposals for development of a posted field from the perspectives of technologies applied, social and environmental contribution, etc., on an ad hoc basis in the absence of clear legal criteria for such evaluation. Negative consequences of the tender procedure abandonment will be discussed below.
6. Article 47 of the Draft.
7. Article 49 of the Draft.
8. Para. 2, article 49 of the Draft.
9. Article 17.1 of the federal law "On the Subsoil" as of 21.02.1992 No. 2395-1.
10. Federal Agency for Natural Resources Use Supervision.
11. Article 54 of the Draft.
12. Para. 3 of chapter 4 of the Draft.
13. Para. 2, article 43 of the Draft.
14. Para. 3, article 43 of the Draft.
15. Para. 6 of article 11 of the federal law "On the Subsoil" as of 21.02.1992 No. 2395-1.
16. Article 25.1 of the federal law "On the Subsoil" as of 21.02.1992 No. 2395-1.
17. Para. 4, article 43 of the Draft.
18. Federal Registration Service – a public agency responsible for registration of real estate transactions.
19. Federal law "On State Registration of Rights to Immovable Property and Transactions Therewith" as of 21.07.1997 No. 122-FZ.
20. Para 1, article 2 of the federal law "On State Registration of Rights to Immovable Property and Transactions Therewith" as of 21.07.1997 No. 122-FZ.
21. Para. 3, article 79 of the Draft.
22. Article 60 of the Draft.
23. Para. 5, article 60 of the Draft.
24. "Three Trutnev's Criteria" // Gazeta No. 197 as of 18.10.2005.
25. Decree of the president of Russia "On Russian national strategy for protection of the environment and ensurance of sustainable development" as of 04.02.1994 No. 236. Federal law "On Protection of the Environment: as of 10.01.2002 No. 7-FZ. Decree of the president of Russia "On fundamental principles of the national energy strategy up to 2010" as of 07.05.1995 No. 472.
26. This article was written in early January of this year. To update the reader on the status of the Draft bill "On the Subsoil", as of January 19, 2006, the Draft had received its first and second readings in the Duma. The third, and final, reading was expected on January 25. So, the provisions of the Draft, as described by Ms. Goudina, will become law.

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