Resources

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The Newsletter of the Canadian Institute of Resources Law

Policy Advice on the Russian Oil and Gas Sector

by *Janet Keeping**

Resume

L'institut canadien du droit des ressources, conjointement avec plusieurs ministères et organismes de réglementation canadiens, a entrepris plusieurs projets d'aide technique en collaboration avec le ministère des combustibles et de l'énergie de la Fédération de la Russie. Cet article décrit l'arrière-plan de ces projets ainsi que certains aspects de la réglementation de l'industrie des hydrocarbures sur lesquels se concentrent les projets. Le travail porte notamment sur les méthodes d'évaluation de la viabilité économique des projets de développement des hydrocarbures, sur les conceptions déterministes plutôt que probabilistes des méthodologies de classification des réserves pétrolières et sur la façon de les intégrer à un régime réglementaire, sur diverses questions touchant au développement d'une législation afférente à la délivrance de licences pour les hydrocarbures, et sur les aspects environnementaux de la réglementation des hydrocarbures. Les projets sont financés par l'Agence canadienne de développement international.

Background

The Canadian Institute of Resources Law (CIRL) first began to work with the Ministry of Fuel and Energy of the Russian Federation in 1993 as a member of a consortium of Canadian agencies. All but CIRL were government departments or other government institutions. All had jurisdiction over aspects of oil and gas rights issuance or regulation of activity. The consortium was lead by Natural Resources Canada which had signed a Memorandum of Understanding with the Russian Ministry concerning the provision of technical assistance. Funding for implementation of the technical assistance came from the federal government's Bureau of Assistance to Central and Eastern Europe. The work carried out jointly by the Russian Ministry and this consortium came to be referred to as the "Government-to-Government" Initiative.

CIRL's primary role during the period 1993-1996 was to conduct two series of seminars in cooperation with the Ministry of Fuel and Energy. One series addressed inter-governmental relations in the regulation of oil and gas development. The other concerned the integration of environmental protection and indigenous peoples' interests in regulation of the sector. Seminars on the latter topic were organized in collaboration with the Department of Indian Affairs' Northern Oil and Gas Directorate. All but one of these seminars were conducted outside Moscow — in western Siberia, northern European Russia and several other oil and gas producing regions of Russia.

With funds that were surplus to the activities originally agreed, CIRL conducted several more seminars. One of these, for example, was devoted to regulation of offshore oil and gas activity. As well, CIRL and the Ministry jointly published a book entitled "The Development of Oil and Gas Resources in Federal States (the experience of Canada and Russia)".[1]

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The Present Phase of Work

CIRL was encouraged by colleagues from both the Canadian government agencies working on the Russian projects, as well as by Ministry officials, to apply to the Canadian International Development Agency (CIDA) to support continued collaboration. In spring 1997, CIDA approved the first proposal which was for a study of how joint ventures between Russian and foreign companies had functioned since their formation and operation in the petroleum sector became possible in 1989. In early 1998, CIDA approved funding for three additional projects to be carried out under the name "Energy Policy Advice Project". One project is on reserves classifications methodologies and their use in government decision-making processes; one is on Russian oil and gas licensing legislation, and a third is on environmental and indigenous peoples' issues in oil and gas regulation.

The Evaluation of Joint Ventures Project

This project was launched in August 1997 when three members of Newfoundland's Department of Mines and Energy went to Moscow with CIRL's Director of Russia Program's, to meet with Ministry officials and other interested parties. The substantive work on the project has been carried out by various people from the Newfoundland Department, the Canada-Newfoundland Offshore Petroleum Board, as well as Newfoundland and Calgary-based consultants. It has been led by the person who was, until recently, Director of Energy Policy for the Newfoundland Department. CIRL has provided overall management of the project, and has been responsible for its financial administration.

The first stage of the project involved a detailed examination of the fiscal system to which joint ventures, indeed all petroleum companies operating in Russia, have been subject. The report which resulted was carefully reviewed by both Ministry officials and foreign companies working in Russia. The report reaches a number of conclusions, which must be read in the context of the whole document. But amongst them are the following observations:

> If the [fiscal] policy is to create the maximum level of activity under the widest possible economic conditions, the fiscal terms have to be very flexible. Only fiscal systems which are progressive and back-end-loaded achieve this goal. At the same time Russia need to maintain its oil and gas revenue stream from existing fields. This creates a complex set of conditions, and points to the fact that fields which are currently under production would have to be treated differently than new exploration areas.[2]

The report has been very well received. It has been credited with contributing to the Russian government's willingness to adopt legislation necessary to implementation of a production-sharing regime for some Russian fields. While the report is careful to distinguish between criticisms of the generally applicable taxation system and the arguments in favour of production-sharing systems, it is clear that the aforesaid criticisms speak to the need for alternative means of investing in the Russian petroleum sector, at least until the time when the taxation system is made both less harsh and more stable.

The first stage of the project concluded with a second report, which addressed other aspects of the experience with joint ventures in the Russian petroleum sector, including their potential impact on the Russian economy beyond revenue flows to government and the companies.

Both reports are available from CIRL in Russian and English.[3]

The second phase of the Joint Ventures Project involved the modification of a computer programme that had been developed to enable the Newfoundland government to analyze the financial viability of the Hibernia project. The programme was revised to take account of the most salient features of the Russian fiscal system for oil and gas. A two-day session to demonstrate the programme and to train Ministry and other officials on use of the programme was held in Moscow in September 1998. Copies of the programme and an explanatory manual were given to all of the Russian organizations which took part in the training session. This included officials from the Ministry of Natural Resources and several Moscow-based institutes as well. While similar programmes have been devised by Russians, the Canadian programme offers certain features which those do not. Officials in the Ministry of Fuel and Energy have said that the model is more "user-friendly" than any of the Russian programmes and that it is broader in scope. For example, it allows for calculations of the possible impact of a proposed project on the broader economy, such as, on employment.

The third and final phase of the Joint Ventures project consists of a week-long course on the concepts central to an evaluation of "economic viability", as that notion is understood in the West. The course will be offered in Moscow at the end of June and be taught jointly by a Canadian and a Russian economist, both of whom have been involved in earlier aspects of this project. It is hoped that the course will be offered several times again in the future, although funding that would permit this has not yet been secured.

Reserves Classifications Project

For some years, CIRL's colleagues in the Ministry of Fuel and Energy have wanted to work on reserves classifications issues with Canadians. Funding for a project on this topic was approved by CIDA last year. Work on it was begun with a trip to Moscow in June 1998 which involved CIRL staff as

well as geologically-trained people from the National Energy Board, Natural Resources Canada and the Canada-Newfoundland Offshore Petroleum Board.

Two features of the Russian system for classification of oil and gas reserves are under scrutiny in the project. One is the acceptability of probabilistic methods of estimating reserves to Russian decision-makers. At this point only deterministic methodologies are permissible. The other is the extent to which, and how, economic considerations are brought to bear on estimates of oil and gas. Western investors often disagree with Russian officials on both these points and thus negotiations and deliberations at various stages of Russia's project approval process are made more difficult than they need to be. Russian experts in this area are eager that more progressive approaches be adopted by their decision-makers and thus are looking to Canadians and other foreigners for assistance in demonstrating the utility of making changes to their reserves estimates procedures.

The Canadians and Russians involved in the project have exchanged data on a number of pools. By applying their own approaches to data from the other country's deposits, they have confirmed that their methodologies for applying the probabilistic approach are similar and that their understandings of how economics should be applied are also compatible.

The next step will be taken in April when the Canadians involved, along with Ministry colleagues, will conduct a seminar in Archangel (located on the White Sea) to demonstrate the compatibility of approaches and both the importance and feasibility of allowing economic considerations to play a bigger role in government decision-making on reserves estimates. Before the project is concluded next year, several reports will be written. These will address the technical and economic aspects of the joint work and will also examine the steps in the Russian regulatory process where reserves estimates play an important role.

Oil and Gas Licensing Legislation

With restructuring of the oil and gas sector in Russia at the end of the Soviet regime came a need for a new legislative scheme pursuant to which rights could be issued on a competitive basis. A statute of the Russian Federation "On the Subsoil" was adopted in 1992 and amended in 1995. More detailed procedures for implementing the rights issuance process were also adopted later in 1992 but have needed amendment for some time. When the project on oil and gas licensing in Russia was begun last spring, the first request was that Canadians examine the then draft licensing bill which was due to be given second reading in the Duma in September 1998. A workshop was held in Moscow in early September last year which focused on issues of high priority to the Russian side. For example, one of the aspects of licensing that was transfers of licenses, which is not possible under current legislation.

Canadian government personnel involved in the September workshop in Moscow included people from the Newfoundland Department of Mines and Energy, Natural Resources Canada and the Department of Resources, Wildlife and Economic Development of the Government of the Northwest Territories.

The emphasis in this area has now shifted back to the law "On the Subsoil" and it is likely that further work will be done with officials from the Ministry of Fuel and Energy and from the Ministry of Natural Resources on how that law might be amended to as to make the oil and gas license a more flexible instrument. As well, Russian colleagues continue to have a strong interest in the techniques that have been used in other countries to stimulate the exploitation of what they call "difficult-to-produce" resources. Further work in the licensing project may assist on this topic.

Environmental Aspects of Oil and Gas Development

CIDA has also approved funding for a project that would see collaborative work done on environmental aspects of oil and gas development. This project will be begun later this spring. The new head of the Ministry of Fuel and Energy's Environment Department has expressed interest in a number of areas. One would see work on how to ensure at the rights issuance stage that a company will have the funds necessary to handle any environmental requirements, such as proper abandonment or response to emergencies. Another topic of great interest is environmental regulation of the offshore.

Canadian government agencies that have expressed continuing interest in working with the Ministry on environmental matters include the National Energy Board and DIAND's Northern Oil and Gas Directorate.

Visit to Calgary

A group of nine people from the Ministry of Fuel and Energy, Ministry of Natural Resources and various Institutes associated with those ministries spent two weeks in Calgary in November to study aspects of Canadian law and government practice relating to both the Reserves Classifications Project and the Project on Oil and Gas Licensing. Meetings during the first week were hosted largely by the National Energy Board. The second week was spent primarily in meetings at the University of Calgary. Besides a number of people from the National Energy Board, Canadian government officials involved in the meetings in Calgary

included those from the Alberta Energy and Utilities Board, the Canada-Newfoundland Offshore Petroleum Board, the Government of the Northwest Territories, Natural Resources Canada, the Alberta Department of Energy and the Alberta Securities Commission. A couple of Calgary-based consultants donated time to work with the group on reserves classifications questions. The Russian group also visited Natural Resources Canada's Geological Survey and the Alberta Government's Core Research Laboratory. Overall organization and management of the visit was provided by CIRL.

Attitudes Brought to the Work

The Canadians involved in the projects underway are well aware that it is not for them to urge any particular policy objectives on Russians or Russian institutions. They have tried first to ascertain what it is that Russian colleagues want to accomplish and then to assist in the provision of information or comparative experience relevant to the attainment of those goals. The attitude taken has been, "If you want to accomplish A, then in our experience you would probably want to, or not want to, do B, C or D". Very productive discussions sometimes have centred on problems encountered with approaches tried here: as one might expect, some of our failures are more instructive then our successes.

Collaboration with Canadian and other Non-Russian Organizations

CIRL and its Canadian colleagues on these projects have frequent contact with other organizations working on Russian oil and gas matters. Sometimes this involves active collaboration. For example, the Norwegian Petroleum Directorate will be participating in the seminar on Reserves Classifications issues in April. Both the International Energy Agency in Paris and the Petroleum Advisory Forum in Moscow are consulted from time to time on developments in the Russian oil and gas sector. CIRL and colleagues also try to keep apprised of other institutions' projects with Russian government agencies, such as those of the Parliamentary Centre in Ottawa, the Inuit Circumpolar Conference and the Southern Alberta Institute of Technology (SAIT).

Involvement of Canadian Industry

For the time being, Canadian companies are less interested in Russia than they were several years ago. Still, CIRL and colleagues consult with those that are still working in Russia or those who are trying to get projects going. Some of the people contacted in this capacity have considerable experience with the Russian oil and gas sector and their views have been very helpful in project planning.

What Next?

CIRL has been encouraged to think about offering programmes which would use the Ministry of Fuel and Energy's Russia-Canada Training Centre in Moscow as a home base. This Training Centre was developed jointly by SAIT and the Ministry. At present the thinking is that SAIT and CIRL would each offer a series of short-term courses (one to three weeks in length) on topics which are within their own areas of expertise or curriculum experience. It is intended that these would be offered both in Moscow and in some of the oil and gas producing or prospective regions. If such plans are proceeded with, CIRL would be coordinating its activities with those of other Canadian organizations involved in aspects of the Russian oil and gas sector, such as the Parliamentary Centre and DIAND's Circumpolar Liaison Directorate, which has long standing Russian connections and has worked in tandem with the Inuit Circumpolar Conference on projects with Russian governmental organizations.

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Notes

1. The Development of Oil and Gas Resources in Federal States, The Experience of Canada and Russia (Moscow: All-Union Research Institute for the Organization, Management and Economics of the Oil and Gas Industry, 1997).

2. Page 32 of the report.

3. "Economic Evaluation of the Russian Generic Fiscal System for Oil", February 1998, and "Petroleum Joint Ventures in Russia: Recent Operating Experience and Potential Economic Impacts", May 1998.

NEW PUBLICATION

Resource Developments on Traditional Lands: The Duty to Consult
by Cheryl Sharvit, Michael Robinson and Monique M. Ross. 1999. 26 pages. Occasional Paper #6. $10.00

Recent Canadian court decisions have scrutinized the way in which governments, when their actions or decisions may infringe on Aboriginal or treaty rights, consult with potentially affected Aboriginal people. Consultation is a key consideration in the justification analysis developed by the Supreme Court of Canada in the Sparrow decision to determine whether government is justified in infringing those rights. This paper contrasts the type of consultation that often prevails in practice with the duty to consult emerging from the case law.

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Recent Developments in Canadian Oil and Gas Law

*by Nigel Bankes**

Constitutional Change in Northern Canada: Yukon Obtains Control of Oil and Gas Resources

Under the terms of the *Constitution Act, 1871*, the federal parliament has exclusive authority to make laws for the Yukon Territory. The Yukon Territory was created in 1898 and in practice the federal parliament, through the *Yukon Act*, RSC 1985, c. Y-2 has delegated legislative control over an increasingly broad range of matters to the Yukon legislature. Although the Yukon has had the authority for some time to make laws for the regulation of the oil and gas industry, it has been precluded from doing so by two main considerations. First, with the exceptions of lands transferred to First Nations under the terms of Yukon First Nation Land Claim Agreements, all oil and gas rights, and indeed practically all public lands, have been held by Canada for the use and benefits of Canadians as a whole. Second, as a matter of practice, Canada has completely occupied the oil and gas field through the *Canada Petroleum Resources Act* ("CPRA") which deals with the disposition of public oil and gas rights and the *Canada Oil and Gas Operations Act ("COGOA")* which regulates the exploration for, and production of, oil and gas.

Hitherto, such public lands as have been transferred to the Commissioner for Yukon for the use and benefit of Yukon have been confined to surface title lands within city and municipal boundaries.

In May 1993, Yukon and Canada entered into an Oil and Gas Accord which called for the transfer of oil and gas rights and legislative control. The *Canada-Yukon Oil and Gas Accord Implementation Act*, SC 1998, c. 5, in force, May 12, 1998 ("the *Act*") provides the necessary legislative authority to implement the Accord. The *Act* does three things. First, the *Act* amended the *Yukon Act* to confer on Yukon essentially the same powers to make laws for oil and gas matters as have been held by the provinces since the so-called resources amendment to the Constitution of Canada in 1992. This amendment added s.92A to the *Constitution Act, 1867* and thereby added to the existing legislative powers of the provinces.

Second, the *Act* authorizes Canada to transfer the administration of federal oil and gas lands to the Commissioner for the use and benefit of Yukon. Included in the transfer are existing federal interests including exploration interests in the Eagle Plain area (recently the subject of environmental litigation in *Vuntut Gwitchin First Nation v. Canada Minister of Indian and Northern Affairs*, [1998] FCJ 755 (FCA)) and old gas-producing leases in the Kotaneelee Area in SE Yukon. These existing rights are grandparented through the transfer although they will become subject to regulation by Yukon subject to limits prescribed by the *Act*. Third, the *Act* will amend the *CPRA* and *COGOA* to make them inapplicable within Yukon. This amendment will take effect on the date upon which the administration and control of oil and gas resources are transferred to Yukon (the "Transfer Date"). This occurred in November 1998.

The New Yukon *Oil and Gas Act*

In preparation for becoming the newest oil and gas producing jurisdiction in Canada the Yukon has enacted an *Oil and Gas Act* SY 1998, c.16, that will become effective on the "Transfer Date" (see previous item). The *Act* is divided into five parts. Part 1 deals with certain administrative matters common to public leasing statutes but it also contains innovative provisions designed to make possible a common oil and gas regime with Yukon's fourteen First Nations. Part 2 creates the disposition regime for Yukon oil and gas lands. The *Act* envisages a two stage tenure scheme with exploration carried out under the terms of a permit (maximum term including renewals, 10 years) and with conversion to a lease for production purposes. Royalties will be prescribed by regulation. Part 3 provides comprehensive authority for regulating all aspects of the oil and gas industry from exploration to production and pipelining. Part 4 deals with general matters including offences and audits and Part 5 deals with certain transitional matters. The Yukon is currently developing the body of regulations necessary to implement the *Act*.

Anticipatory breach and bankruptcy

Where a gas broker repudiates a contract by giving notice that it will not be able to meet contractual commitments in subsequent contract months the purchaser may well have an unliquidated damages claim for the incremental costs of replacing its gas supply, but this will not amount to an indebtedness that will permit the purchaser to petition the broker into bankruptcy. So held Justice Fraser in *LG & E Natural Canada Inc. v. Alberta Resources Inc*, [1997] AJ 1013 (QB) discussing s.43(1)(a) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3. The court also held that this was not an appropriate case to grant a stay to permit the purchaser to perfect its damages claim by obtaining judgement on the anticipatory breach.

Conditional rights of set-off and claims in bankruptcy

The terms of a gas purchase and sale agreement allowed the parties to set-off amounts owing on the due date each month, provided that there was prior agreement. As a matter of practice, the parties routinely agreed to set-off. However, in November 1996 there was no agreement as to the net amount owing and therefore Chevron issued a cheque for the full amount it owed. Meanwhile NESI had made out a cheque for the net amount owing. Following a telephone conversation, NESI agreed to cancel the net cheque and to issue another cheque for the gross amount it owed Chevron. After the cheque was made out, but before it could be picked up by Chevron, NESI obtained an order under the *Company Creditors Arrangements Act* and the cheque was withdrawn. Chevron sought to argue that it was not a mere debtor for the net amount owing and that it had an equitable proprietary entitlement to the money based upon: (1) unjust enrichment, (2) payment under a mistake or (3) an implied trust. All three arguments were rejected by Justice Forsyth of the Alberta Court of Queen's Bench in *Chevron Canada Resources v. KPMG* [1998] AJ 679 (QB). There was no unjust enrichment because the contractual arrangement provided a juristic reason for the enrichment; set-off was only permissible where the parties had reached a prior agreement. There was no mistake about the payment; Chevron was obliged to pay the gross amount owing in the absence of agreement. There was no implied trust because there was nothing to indicate that the arrangement was anything other than a debtor-creditor relationship. Given the premise of the judgement that the right of set-off was conditional upon an agreement to set-off each month, the conclusion seems fully justified. Any other conclusion would have accorded Chevron an unfair advantage over other creditors.

Co-owner of mines and minerals applies under Part 3 of the Law of Property Act

There are so few decisions dealing the application of Part 3 of the *LPA* to mines and minerals that even minor decisions are noteworthy. In *Kasha and Haljan v. Bye et al*, [1998] AJ 697 (MC) the defendants objected to the application of Part 3 apparently either on the basis that the plaintiffs were the holders of a fee simple interest in a severed mineral estate, or on the basis that the defendants held their undivided interest as joint tenants *inter se*. Both objections were rejected.

Four Crown Royalty Cases

Although there have been many cases over the years dealing with the construction of private royalty agreements and permissible deductions, we have seen very little litigation dealing with Crown royalties. In the last six months there have been four decisions handed down, three dealing with Indian royalties and one dealing with Alberta Crown royalties.

In *Imperial Oil Resources v. Canada (Minister of Indian Affairs and Northern Development)*, [1997] FCJ 1767 the applicant was the lessee of Indian oil and gas lands. The applicable royalty regulations stipulated that royalty was to be calculated at the time and place of production "free and clear of any deduction whatever" save for permissible processing fees. Imperial's predecessor had marketed gas production from reserve lands by selling to a subsidiary. The sale price to the subsidiary was fixed at 95% if the actual sale price received by the subsidiary. Upon audit, the Minister formed the view that the deduction was not permissible. Imperial sought judicial review of the Minister's decision in Federal Court. Justice Rothstein granted the application primarily on the basis that the Minister had erred in law by treating the parent and subsidiary as a single entity. If the Minister were concerned about the non-arms-length transaction the Minister should have used his power under the regulations to deem a price. The lessee was similarly successful in *Shell Canada Limited v. AG Canada*, [1998] 3 FC 223 (T.D.), aff'd [1998] FCJ 1525 (C.A.) Shell made a deduction for processing costs and included an item based on the capital costs of the processing equipment. Following an audit, the Department, and then the Minister on appeal, took the view that capital costs should have been reduced by certain investment tax credits (ITCs) that Shell had obtained. The court held on the application for judicial review of the Minister's decision that the Minister had breached the rules of natural justice by failing to accord Shell the opportunity to respond to Departmental submissions as to the appropriate treatment of ITCs.

The third Indian royalty case was very different. In *Stoney Tribal Council v. PanCanadian Petroleum Ltd*, (1998) 218 AR 201 (Q.B.) the case was commenced by the Tribe as an action and not as an application for judicial review. The Tribe successfully contended that PanCanadian (PC) had no right to make deductions for TOPGAS charges and operating and maintenance charges (OMAC). These charges were imposed by TCPL the purchaser of the gas and simply passed on on a *pro rata* by PC to the Crown. TOPGAS charges represented the financing costs of TCPL's take-or-pay obligations which costs had been added to TCPL's cost of service or were otherwise recoverable from producers under the terms of provincial TOPGAS legislation. Justice McIntyre of the Alberta Court of Queen's Bench held that the deductions were not permissible, both on the basis of the Indian royalty regulations but also on the basis that the provincial TOPGAS legislation was inapplicable to reserve lands. The court held that since the royalty was an interest in land the action should be treated as an

application to recover an interest in land and therefore subject to a 10 year limitation period under the terms of the Alberta *Limitation of Actions Act*. The court also held that while the Crown owed a fiduciary duty to the Indians, PC did not. The Tribe had sufficient standing to bring the action even though the lease relationship was between PC and the Crown.

The final case in the quartet is *Chevron v. Alberta (Minister of Energy),* [1998] AJ 661 (QB). The provincial royalty regulations accorded the Minister a discretionary power to allow Crown royalty clients to group producing entities for the purposes of reporting production for royalty purposes. Although grouping doubtless produced some administrative efficiencies, industry's main reason for grouping was to pool and average processing costs and thereby reduce total royalty liability. Chevron made an application to re-calculate its royalty liability for certain production years (as it was entitled to) but based on grouped production. The Department rejected the request on the basis that it did not grant retroactive grouping applications and on the basis that Chevron was making the application to reduce royalty liability and not to decrease administrative costs and that this was an impermissible use the grouping procedure.

Chevron sought judicial review leading evidence that the Department had routinely granted retroactive grouping applications. Not surprisingly, the application was granted by the Alberta Court of Queen's Bench which noted that while the Minister was entitled to some curial deference her decisions were still reviewable if patently unreasonable. The court concluded that the Minister had rejected the application for an ulterior and impermissible motive namely to save the Minister from having to make a rebate. There was no basis for the conclusion that the grouping procedure was only available where it served the goal of administrative efficiency.

When is a liquidated damages clause a penalty clause and therefore void?

A gas broker negotiated a number of contracts under which the seller assumed liability for failure to deliver. The contracts prescribed certain categories of costs (e.g. incremental acquisition costs) for which the purchaser could recover and, in addition, prescribed a per GJ charge which varied by contract from 5 cents to $1. In *Ashland Scurlock Permian Canada Ltd. v KPMG* [1998] AJ 678 KPMG as the trustee in bankruptcy for the broker, NESI Energy, argued that the unit charge was a penalty and therefore not recoverable. There was evidence to the effect that the clauses were primarily designed to deal with the transaction costs associated with negotiating replacement contracts. Justice Forsyth of the Alberta Court of Queen's Bench held that some of the clauses were penalty clauses but that others were true liquidated damages clauses. Clauses were rejected where the amount of the multiple used in the formula created an extravagant amount which had no real relation to the loss which the purchaser might sustain, or because the amount could only be justifiable if it related to remote or unusual damages rather than a genuine pre-estimate of the type of losses that could be sustained. The clauses were enforced where recovery under the per GJ charge formed a relatively small portion of the total damages claim. The court accepted the principles that the validity of the charge should be determined at the time of breach and that the court should not readily interfere with a freely negotiated contract. The overarching principle was that the clause should be enforced unless oppressive or unconscionable; a provision would be such if so extravagant or exorbitant that it has no real relation to any loss that a purchaser might suffer.

What constitutes breach of a pipeline easement agreement?

In *CWNG v. Empire Trucking,* [1998] 10 WWR 590 (QB) Justice Moshansky had to consider whether Empire's use of the dominant hereditament for storing disabled vehicles and parts constituted a breach of CWNG's rights. Notwithstanding general language in the grantee's covenant to the effect that it would not "erect any buildings or structures" on the ROW, Justice Moshansky had little difficulty concluding that Empire's activities constituted a breach. He also summarily dismissed arguments based on laches, limitations and estoppel, observing that the mere passage of time was not significant in the absence of some prejudice or injustice to Empire if the terms of the easement were now enforced. The abandonment argument was equally doomed; after all, CWNG had actually used the ROW continuously for some three high pressure pipelines and had complained from time to time about encroachments on its easement.

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More detailed versions of these digests may be found in *Canadian Oil and Gas* published by Butterworths.

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Resource Development and the MacKenzie Valley Resource Management Act: *The New Regime*

June 17 & 18, 1999, Calgary, Alberta

The *Mackenzie Valley Resource Management Act*, (the "MVRMA") was called into force in December 1998, thus satisfying one of the most important commitments made by Canada when the Gwich'in and Sahtu Dene and Metis land claim agreements were settled. This new legislation has re-ordered the regulation of resource development in the Western NWT.

The MVRMA establishes new institutions of public government, including regional Land Use Planning Boards and Land and Water Boards in the Gwich'in and Sahtu Settlement Areas and an Environmental Impact Review Board with jurisdiction over the whole Mackenzie Valley. Consultation on the new legislation has taken place with the resource development industries but there are still many questions unanswered about how the MVRMA will affect exploration and development.

This conference will bring together senior representatives of the mining and oil and gas industries, the new MVRMA resource management boards, First Nations and government in a forum where all can contribute their expertise to an exploration, discussion and better understanding of the new regime.

All registrants will receive a comprehensive background paper which will include an analysis of the application of the new regime to representative mining and oil and gas projects. The registration fee is $595.00 and includes attendance at all sessions, materials and lunch.

For a brochure and registration form, please contact:
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The conference program, registration form and further information can also be obtained from the Institute's web site: http://www.ucalgary.ca/~cirl

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