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Resource Development and the *Mackenzie Valley Resource Management Act*

by John Donihee*

Introduction

The *Mackenzie Valley Resource Management Act*[1] (MVRMA) was called into force December 22, 1998 in satisfaction of promises made to the Gwich'in and Sahtu Dene Metis in their comprehensive land claim agreements settled in 1992 and 1993 respectively.[2] The changes to the resource management regime in the Northwest Territories which result from this new legislation are the result of specific commitments made by Canada during the negotiation of these land claims.[3] The MVRMA establishes a new and integrated approach to natural resource management in the Mackenzie Valley.[4] This statute effects important changes to the legislative framework for environmental impact assessment and land and water management; it establishes land use planning processes for the Gwich'in and Sahtu settlement areas and will result in an environmental and cumulative effects monitoring program for the Mackenzie Valley. The MVRMA also establishes new institutions of public government responsible for environmental impact assessment, land and water management and land use planning. These boards will play an integral and continuing role in resource management and development in the Mackenzie Valley.

This article will provide a brief overview of some of the features of the new legislative regime, specifically focussing on environmental impact assessment and land and water management.[5] An understanding of the new regime will be important for oil and gas companies which are looking north with renewed interest as a result of improved oil and gas prices and also for mining companies given the continuing interest in diamond exploration and development in the Northwest Territories.

The Gwich'in and Sahtu Land Claims and the MVRMA

The Gwich'in and Sahtu land claims required that an integrated system of land and water management be established in the Mackenzie Valley. Chapter 24 of the Gwich'in land claim and Section 25 of the Sahtu land claim outline the framework for this system of environmental impact assessment and land and water regulation.

Current Geographic Application of the MVRMA

The current application of the MVRMA is limited. Part 5 which establishes the Mackenzie Valley Environmental Impact Review Board (MVEIRB) and the environmental impact assessment system for which this Board is responsible, applies to and is in force for the whole Mackenzie Valley. Part 3 of the MVRMA establishes the Gwich'in Land and Water Board (GLWB) and the Sahtu Land and Water Board (SLWB). This regime applies only to the Gwich'in and Sahtu settlement areas respectively. The MVRMA will allow expansion of its land and water management framework to areas of the Mackenzie Valley outside the Gwich'in and Sahtu settlement areas

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La *Loi sur la gestion des ressources de la vallée du Mackenzie* est entrée en vigueur en décembre 1998. Ce nouveau régime modifie profondément les processus d'étude des impacts environnementaux et le mode de gestion des terres et des eaux dans la vallée du Mackenzie. Les sociétés pétrolières et minières actives dans cette région des Territoires du Nord-Ouest devraient se familiariser avec les nouvelles dispositions afin de pouvoir gérer efficacement leurs opérations dans ce nouveau cadre réglementaire. Cet article offre un aperçu des modifications effectuées aux processus d'étude des impacts environnementaux ainsi qu'aux modes de délivrance des permis d'utilisation des terres et des licences d'utilisation des eaux dans la vallée du Mackenzie.

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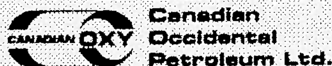

through the calling in to force of Part 4, currently scheduled to take place at the end of 1999.[6]

Environmental Impact Assessment under the MVRMA

The Scope and Responsibility for EIA under the MVRMA

The *Mackenzie Valley Resource Management Act* has replaced the *Canadian Environmental Assessment Act*[7] (CEAA) as the primary process for environmental impact assessment (EIA) in the Mackenzie Valley.[8] The process described in Part 5 of the MVRMA applies to a "development" which is defined by section 111 of the Act as follows:

"development" means any undertaking, or part of an undertaking, that is carried out on land or water and, except where the context otherwise indicates, wholly within the Mackenzie Valley, and includes measures carried out by a department or agency of government leading to the establishment of a national park subject to the *National Parks Act* and an acquisition of lands pursuant to the *Historic Sites and Monuments Act*.

Impact on the environment" is defined in section 111 as follows:

"Impact on the environment" means any effect on land, water, air or any other component of the environment, as well as on wildlife harvesting, and includes any effect on the social and cultural environment or on heritage resources.

This definition of "environment" in the MVRMA is identical to that found in section 2 of the CEAA.

The broad definitions of "development", "impact on the environment" and "environment" result in considerable scope for the application of the Part 5 process.

Sections 114 and 115 apply to all stages of the Part 5 EIA process and outline the purpose and guiding principles of the MVRMA environmental impact assessment process. These include ensuring that the environmental impacts of proposed developments and the concerns of aboriginal people and the public receive careful consideration in the EIA process and that "the protection of the social, cultural and economic well-being of residents and communities in the Mackenzie Valley" be considered. This latter principle, in combination with the definition of "impact on the environment" found in section 111 makes it clear that the MVRMA's EIA process includes direct consideration of socio-economic impacts.

Consideration of the sections 114 and 115 factors constitutes superadded duties for the authorities which are responsible for preliminary screening under Part 5. These factors extend beyond the narrower agency mandate which regulatory authorities bring to the conduct of their preliminary screenings.

The MVRMA EIA process includes three distinct stages: preliminary screening, environmental assessment and environmental impact review. The rules applicable to each stage of the process are reviewed briefly below. It is not necessary for a development to go through all three stages before an approval can be granted.

Preliminary screening is the responsibility of regulatory authorities[9] (RAs), the designated regulatory agency[10] (DRA), and governments when they are the proponent of a development and no licence or permit is required. The second and final stages in the process, environmental assessment and environmental impact review are the exclusive responsibility of the Mackenzie Valley Environmental Impact Review Board (MVEIRB).[11] There are no provisions in the MVRMA for comprehensive reviews or mediation such as are found in the CEAA.

The MVEIRB is a permanent board which is central to and plays a supervisory role in the process established under Part 5 of the Act. This Board is subject to the rules of fairness and to the supervision of the Courts by way of judicial review. The Board can make its own rules of procedure and has the authority pursuant to section 120 of the Act to establish guidelines respecting the process outlined in Part 5. It has already published Interim Guidelines[12] to assist developers and government decision-makers in understanding and participating in the EIA process in the Mackenzie Valley.

A Brief Description of the EIA Process under the MVRMA

Preliminary screenings are undertaken by regulatory authorities responsible for issuing the permits, licences or authorizations listed in the Preliminary Screening Requirement Regulations.[13] A screener must notify the MVEIRB in writing of the receipt of an application and conduct the preliminary screening unless the activity is listed on the Exemption List Regulations.[14] For developments that do not require licences, permits or authorizations and for which the proponent is the federal or territorial government or the Gwich'in or Sahtu First Nation, the MVRMA also requires preliminary screening, unless the development is exempted by regulation or its impact is manifestly insignificant.

Some developments may be subject to a requirement for multiple permits or licences. In such circumstances, screeners may adopt the screening report prepared by another agency. Subsection 124(3) specifies that when one of the screeners is a Land and Water Board, the others need not conduct a preliminary screening at all. The statutory framework intends that these Boards should carry most of the burden for screenings and thus attempts to avoid duplication of effort at this stage of the Part 5 process. Subsection 118(1) also contributes to coordination of screening activities. It specifies that "no licence permit or authorization required for the carrying out of a development may be issued under any federal or territorial law until the requirements of this Part[5] have been complied with..."

Section 125 outlines the test applicable to screening decisions. If in the screener's opinion the development might have significant adverse impact on the environment or might be the cause of public concern, then the development must be referred to the MVEIRB for environmental assessment. This test does not require a high degree of certainty before a referral can be made.

Environmental assessment is the second stage in the MVRMA system. Comparison of subsection 117(2) which outlines the factors to be considered by the Board in an assessment indicates a close affinity with the contents of section 16 of the CEAA which describes CEAA screening requirements. The MVEIRB establishes the scope of the development and once the developer submits an environmental assessment report and public input is completed, makes a determination under section128 that (a) the development is unlikely to cause

significant adverse environmental impacts or to be a cause of significant public concern, in which case the project is recommended to proceed into the regulatory process without any terms and conditions; (b) where the development is likely to cause significant adverse environmental impacts, recommend either a panel review or approval subject to terms and conditions; (c) where the development is likely to cause significant public concern, order an environmental impact review; and (d) where the development is likely to cause an adverse impact on the environment so significant that it cannot be justified, recommend that it be rejected without an environmental impact review.

The federal Minister, upon receipt of the MVEIRB's assessment report and reasons, may order an environmental impact review notwithstanding a decision under paragraph 128(1)(a); adopt recommendations made under subparagraph 128(1)(b)(ii) or paragraph 128(1)(d) or refer them back to the Board for reconsideration or after consulting the Board adopt the revised recommendation with modifications or reject it and order an environmental impact review.[15]

Environmental impact reviews are conducted by panels of three or more appointed by the MVEIRB and may include members other than Board members, chosen for their expertise. Panel reviews will work much as under the more familiar CEAA process. The MVEIRB prepares terms of reference for the panel in consultation with responsible Ministers and First Nations. The proponent prepares and submits an environmental impact statement and, subsequent to public scrutiny and other analyses, hearings or meetings, the panel makes recommendations to the federal and responsible ministers for a decision. After considering the panel's recommendations, the Minister may adopt them, refer them back to the panel for reconsideration and then after consultation with the panel, adopt the recommendations with modifications or reject them.

Integrating the EIA and Land and Water Management Processes

The Gwich'in and Sahtu land claims required the establishment of an integrated land and water regulation and environmental impact assessment system in the Mackenzie Valley. To accomplish this integration, the MVRMA includes a number of provisions to ensure the coordination of the activities of Land and Water Boards, regulatory authorities and the MVEIRB. Preliminary screeners can adopt a common screening analysis or the Land and Water Boards can undertake this responsibility on behalf of all screeners. If public hearings are necessary, subsection 24(2) of the Act requires boards to coordinate their activities in order to avoid duplication. Section 62 of the Act prohibits a Land and Water Board from issuing a licence, permit or authorization unless the requirements of Part 5 have been satisfied. That section also requires that such permits, licences and authorizations include any conditions that are required to be included in it pursuant to a decision under Part 5. Thus the statutory system provides, in a variety of ways for coordination, efficiency and the integration demanded by the land claims.

Land and Water Management under the MVRMA

The MVRMA has established new institutions which are responsible for both land and water regulation. These new boards established by Part 3 of the Act are institutions of public government subject to supervision by the Courts and bound by the rules of fairness. In areas where the MVRMA is in force, approvals for land and water use are now granted by a single institution. The legislative and regulatory framework for land and water has been partially integrated under the MVRMA.[16]

Land and Water Management Boards

The Gwich'in and Sahtu Land and Water Boards work within a statutory and regulatory framework which should largely be familiar to the oil and gas and mining industries. The new Mackenzie Valley Land Use Regulations[17] are modelled very closely on the familiar Territorial Land Use Regulations[18] and the water licensing system found in Part 3 of the Act is still largely based on the *Northwest Territories Waters Act*[19] and its regulations. Section 65 of the Act also authorizes these Boards to establish guidelines and policies respecting licences permits and authorizations, including their issuance under Part 3. Both the Gwich'in and Sahtu Land and Water Boards have prepared guidelines for their land use permit and water licence issuance processes.[20]

The Gwich'in and Sahtu Land and Water Boards are required by the MVRMA to locate their main offices in their respective settlement areas. The office for the GLWB is in Inuvik. The office for the SLWB is in Fort Good Hope.

Land Use Management

The land and water boards' jurisdiction with respect to land management is limited to the surface only[21] and includes uses of land necessary for the exercise of subsurface rights.[22] Their jurisdiction does not extend to national parks and historic sites or to the use of land within the boundaries of a municipality, to the extent that the local government regulates land use. The general purpose of land and water regulation is outlined in section 58 of the MVRMA:

> "A board shall regulate the use of land and waters and the deposit of waste so as to provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit to the residents of the settlement area and Mackenzie Valley and to all Canadians."

The Boards' jurisdiction for "all uses of land in the settlement area for which a permit is required under this Part"[23], results in the application of the MVRMA's land management provisions to settlement lands owned by First Nations.[24] In this respect, the Sahtu and Gwich'in land claims differ from previously settled claims in the NWT and Nunavut where aboriginal land management is entirely private. In the Mackenzie Valley, the result is a more fully integrated land and water management system with a common set of rules and institutions for all areas.[25]

Section 59 of the MVRMA specifies that the land and water boards have, subject to the regulations, the authority to issue, amend, renew, suspend and cancel permits and authorizations for the use of land as well as the authority to approve the assignment of land use permits. Thus, the land and water boards have an enforcement role which extends their responsibilities beyond the mere issuance of permits. The land and water boards do not, however, have their own enforcement staff. Inspectors appointed

under the Mackenzie Valley Land Use Regulations (MVLUR) are Department of Indian Affairs and Northern Development (DIAND) employees.

Land and water boards are required pursuant to sections 63 and 64 of the Act to consult with and provide copies of applications for licences or permits to the owners of affected land, appropriate federal and territorial government departments, affected communities, First Nations and the Renewable Resources Boards established by the land claim agreement for the settlement area before making a decision.

The MVLUR establish two types of land use permits on bases very similar to those found in the Territorial Land Use Regulations.[26] Land and Water Boards have very tight time frames for conducting public consultations and making their land use permitting decisions as a result of the time lines established in sections 22 and 23 of the MVLUR, in most cases, 42 days for a Type A permit and 10 days for a Type B permit.

A land and water board may require the posting of security as one of the conditions for either the issuance or the assignment of a permit. Security can be used by a land and water board, upon application to the Minister, where damage to lands results from a permittee's contravention of any provision of the regulations or a permit. A permittee's liability for any damages caused to land is not limited by the amount of posted security.

Land and water boards are required by section 72 of the MVRMA to maintain a Public Register in their main offices into which shall be entered for each application received and each permit issued the information prescribed by the regulations.[27] This register is open to inspection by any person during the normal business hours of the board.

Water Management under the MVRMA

The Gwich'in and Sahtu Land and Water Boards have replaced the Northwest Territories Water Board established by the *Northwest Territories Waters Act* (NWTWA)in the Gwich'in and Sahtu settlement areas for purposes of water use regulation and management. Part 3 of the MVRMA contains the provisions outlining the land and water boards' jurisdiction and responsibilities for water management. Part 3 of the Act does not replace the NWTWA. Instead, Part 3 makes the changes necessary to adapt that Act and to make the water management regime in the Sahtu and Gwich'in settlement areas consistent with the requirements of the land claims. As a result, the NWTWA continues to apply in the Gwich'in and Sahtu settlement areas in a modified manner.

In order to fully understand the water management regime in the Gwich'in and Sahtu settlement areas, Part 3 of the MVRMA and the NWTWA must be read together. Outside the Gwich'in and Sahtu settlement areas, until Part 4 of the Act is called into force, the NWTWA continues to apply in a manner unaffected by the MVRMA and the NWT Water Board is still responsible for licensing decisions.

The water use regulation and management provisions outlined in Part 3 of the MVRMA is based upon and supplemented by the NWTWA and the Northwest Territories Waters Regulations.[28]

Section 58 of the MVRMA, specifies that the land and water boards shall regulate the use of waters and the deposit of waste so as to provide for the conservation, development and utilization of water resources. This statement of objectives mirrors that found in section 12 of the NWTWA. Section 60 of the MVRMA outlines the jurisdiction of land and water boards with respect to water and waste. That jurisdiction is established by reference to the NWTWA and includes the power to issue, amend, renew and cancel licences, approve the assignment of licences and to exercise any other power of the NWT Water Board under the NWTWA.

A land and water board has jurisdiction in respect of all uses of waters and deposits of waste into water in its settlement area for which a licence would be required under the NWTWA. A land and water board may suspend a licence for a specified period where the licensee contravenes the provisions of the NWTWA or of Part 3 of the MVRMA or a term or condition of a licence. If a use of waters or a deposit of waste in a settlement area has an adverse effect on a region of the NWT outside the settlement area, subsection 60(3) of the MVRMA extends the compensation protections provided by subsections 14(4) and (5) of the NWTWA to the licensees and other persons affected outside the settlement area.

Subsection 60(4) of the MVRMA lists those provisions of the NWTWA which do not apply in respect of a settlement area for which a land and water board has been established. Review of the NWTWA provisions listed in subsection 60(4) and (5) of the MVRMA, which do not apply in the Gwich'in and Sahtu settlement areas indicates that these exemptions do not result in any gaps in the water use regulation and management system for these settlement areas. In one way or another, the MVRMA or the land claims provide for all the exempted requirements and functions. All of the major elements of the NWTWA water management system with which the oil and gas and mining industries have long been familiar are still in place under the new statute. Changes to this new system cannot be made without consultation with the Gwich'in and Sahtu Dene and Metis.[29]

Some changes have nonetheless resulted to the water management system, as required by the land claims. They are briefly reviewed below.

Sections 73 to 76 of the MVRMA give effect to and protect the special aboriginal water rights negotiated through the Gwich'in and Sahtu land claim agreements. In the Sahtu land claim, these rights are outlined in Article 20. Sections 77 to 79 of the MVRMA reflect the water compensation arrangements negotiated by the Gwich'in and Sahtu First Nations to further protect their settlement lands and aboriginal water rights. These First Nations have the exclusive right to use water when on or flowing through their settlement lands. They were also granted the right to have waters on or flowing through their settlement lands unaltered as to quality, quantity or rate of flow by any person. Licences which might affect these rights may be issued but only if there is no other reasonable alternative and subject to the requirement for the licensee to pay compensation. Section 78 binds water authorities outside the settlement areas which are considering applications which might affect waters on or flowing

through settlement lands to ensure that compensation is paid either by way of a compensation agreement or by an order of a water authority before any licence can be issued.

Thus, the special rights to the use of water granted to the Gwich'in and Sahtu First Nations are protected by an extension of the statutory compensation system which already existed in ss.14(4) of the NWTWA. Compensation claims are likely to be among some of the more difficult issues confronting the land and water boards.

Conclusion

The MVRMA establishes new systems for EIA and land and water management in the Mackenzie Valley. New decision-making institutions are responsible for this system. These changes are the result of solemn promises made by Canada at land claim negotiating tables in the Mackenzie Valley. Successful implementation of this new system will contribute to an integrated land, water and environmental protection system for the majority of the Northwest Territories, a goal which is in the interests of aboriginal and other residents of the Mackenzie Valley and all Canadians.

The transition period could unfortunately be difficult, given the current uneven application of MVRMA provisions, the need for training of the new boards and their staff and the time needed for both government and industry to become familiar with the new rules. The need for open communication among all affected parties and leadership, particularly by the Department of Indian Affairs and Northern Development will be a crucial determinant of the success or failure of this initiative. The successful implementation of the MVRMA's resource management system is essential in order to ensure that the development opportunities which are so important to the future of this region are not lost.

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Notes

1. S.C. 1998, c. 25.

2. *Comprehensive Land Claim Agreement Between Her Majesty the Queen in Right of Canada and the Gwich'in as Represented by the Gwich'in Tribal Council* (Ottawa: Indian and Northern Affairs Canada,1992); *Comprehensive Land Claim Agreement Between Her Majesty the Queen in Right of Canada and the Dene of Colville Lake, Fort Good Hope, and Fort Norman and the Metis of Fort Good Hope, Fort Norman and Norman Wells in the Sahtu Region of the Mackenzie Valley as Represented by the Sahtu Tribal Council* (Ottawa: Indian and Northern Affairs Canada,1993).

3. See s. 24.1 of the Gwich'in land claim and s. 25.1 of the Sahtu Dene Metis land claim.

4. The "Mackenzie Valley" is defined in s. 2 of the Act to mean that part of the Northwest Territories bounded on the south by the 60th parallel of latitude, on the west by the Yukon Territory, on the north by the Inuvialuit Settlement Area and on the east by the Nunavut Settlement Area. This is, in effect, all of the Northwest Territories except the Inuvialuit settlement area since April 1 , 1999, when the new Nunavut territory was created.

5. Consistent with the scope of this article, any reference to the MVRMA resource management system below should be understood to include only Parts 3,4 and 5.

6. The Mackenzie Valley Land and Water Working Group which is planning for the application of Part 4 across the Mackenzie Valley recently indicated that it would require additional time to prepare for the transition to Board status.

7. S.C. 1992, c.37.

8. There are some limited exceptions listed in s. 116. They include development proposals considered to be in the national interest and developments partly in and partly outside the Mackenzie Valley.

9. These are persons or agencies responsible for issuing a licence permit or other authorization required for a development under any federal or territorial law.

10. The only Designated Regulatory Agency under the MVRMA is the National Energy Board.

11. Some exceptions with respect to environmental impact reviews may occur. In cases determined to be in the national interest a joint MVRMA-CEAA review could result. Where transregional projects and transboundary effects occur, cooperative reviews with other jurisdictions are possible. A joint panel might also result where the National Energy Board is responsible for issuing the licence, permit or authorization. See sections 138 to 142 of the MVRMA.

12. Environmental Impact Assessment in the Mackenzie Valley, Version 1 (Mackenzie Valley Environmental Impact Review Board) Yellowknife, January 1999, 74pp.

13. SOR/99-12.

14. SOR/99-13.

15. *Supra,* notes 8 and 11, the Minister may choose to order a joint review.

16. The integration of land and water regulation effected by the MVRMA is only partial because the *Northwest Territories Waters Act* and the *Territorial Lands Act* continue to apply and provide the basis for important elements of the land and water management regimes. The MVRMA has altered the institutional framework but its regulatory reach is limited to surface land and water use.

17. SOR/98-429.

18. CRC, c.1524 as am.

19. S.C. 1992, c.39.

20. *GSA Water Licence & Land Use Permit Application Process*, Gwich'in Land and Water Board, undated, 20pp. *Water Licence Process* (Draft), Sahtu Land & Water Board, Revised November 24 1998, 9pp. *Land Use Permit Process* (Draft), Sahtu Land & Water Board, Revised October 6 1998, 14pp. Copies are available from the Boards.

21. MVRMA, s. 51.

22. MVRMA, s. 59(2).

23. Section 2 of the Mackenzie Valley Land Use Regulations (like s. 6 of the TLUR) provides for some exemptions from the requirement for a land use permit in the Gwich'in and Sahtu Settlement Areas. Exempted activities include harvesting, hunting trapping and fishing and prospecting.

24. This requirement was included in the land claims. See, for example, s.25.4.1of the Sahtu claim.

25. Because the land and water boards issue permits for the use of private lands one of the first things they require of an applicant requesting a permit for the use of private land is proof that the permission of the land owner has been secured. The land claims guarantee the right of a subsurface interest holder to access to settlement lands for exploration or development purposes, subject to either an agreement negotiated with the owner or to an order of the Surface Rights Board. These access agreements can be important sources of benefits for land owning beneficiaries of the Sahtu and Gwich'in claims.

26. The criteria for distinguishing between a Type A or B permit include such things as the number of person days in a camp, amounts of fuel and explosives stored, size and ground pressure of vehicles etc. See sections 4 and 5 of the regulation.

27. Section 40 of the MVLUR specifies the information which must be recorded on the Public Register. Copies of material on the register are available subject to the fees specified in Schedule 1 of the regulation.

28. SOR/93-303, as amended.

29. Section 68 of the MVRMA requires that the federal Minister consult the land and water boards with respect to any amendment to either the NWTWA or to the MVRMA. Section 83 of the MVRMA requires that the federal Minister consult the Gwich'in and Sahtu First Nations before any amendment is made to the NWTWA or its regulations.

Recent Developments in Canadian Oil and Gas Law

by Nigel Bankes*

Operatorship does not pass with an assignment of the operator's interest: *Kaiser Francis Oil Company of Canada v. Bearspaw Petroleum Ltd. and Norcen Energy Resources Ltd*, [1999] AJ 153 (QB)
Under a 1953 agreement, Kaiser's predecessor in interest was appointed as operator. A 1960 amendment to the original agreement appointed Medallion as the operator. Norcen was the successor in interest to Medallion. The amending agreement provided that except in the case of the usual challenge procedure, there should be no change of operatorship without the consent of the other party first had and obtained. In 1994 Norcen sold its 35% interest in the property to Bearspaw. Kaiser consented to the sale but did not consent to the assignment of the operatorship. Kaiser did tolerate Bearspaw having a temporary period of de facto operatorship on behalf of and in the name of Norcen but now sought a declaration that it was entitled to operate the property.

Justice Sullivan found in favour of Kaiser. He had little difficulty in concluding that Bearspaw had not succeeded to the operatorship both because that right had never been assigned by Norcen but also because Kaiser's consent to the change was required. As noted above, Kaiser had not consented and neither was it estopped from asserting that it had not consented. Such co-operation as had occurred with Bearspaw in order to deal with a drainage problem was more in the nature of an indulgence than a waiver of right.

But if Bearspaw was not entitled to act as operator, was Bearspaw entitled to its declaration? This was a more difficult problem for the agreement did not expressly address the factual situation that had arisen. The court gave two grounds for affirming Kaiser's claim. The first reason, not very convincing at all, was that Kaiser had actually triggered the challenge provision of the agreement by asking Norcen to step down as operator and garnering support from other joint operators for its candidature.

The second ground required the court to terminate the 1960 amending agreement and revive the original 1953 agreement. On a strict reading of the 1960 amendment, a party who assigns its interest in the property but fails to secure consent to an assignment of the operatorship must continue as operator. Justice Sullivan described this situation variously as "somewhat incongruous" and as a "nonsense". In light of that last characterization it was but a short step to conclude that while a contract is prima facie permanent and irrevocable the agreement was terminable upon reasonable notice where the contractual operator has disposed of its interest. In support of this conclusion the court referred to the recital to the 1960 amending agreement which referred to the fact that the operator "is also an owner of an interest in the said properties". The 1960 agreement disposed of , "the operating provision of the 1953 agreements becomes effective again" and thus Kaiser was entitled to succeed as the successor in interest to the original operator. Consequently, it was unnecessary to decide if Kaiser and other joint operators could remove Bearspaw as operator by the simple expedient of a majority vote.

Joint operator that orally consents to additional operations will be liable for full costs notwithstanding failure to prepare new or supplemental AFE and cost overruns
CR and Duce agreed to plug back and re-enter an existing vertical well and complete it as a producing well. CR, as operator under the 1981 CAPL form of operating agreement, prepared the AFE which Duce executed. The operation ran into difficulties from the outset. The parties ultimately drilled three different legs before completing the well. CR also installed a screw pump as well as packers to deal with excessive water flow. The packers were only partially successful with the result that the well had a high oil-water ratio and triggered high battery processing costs. While the parties had a 65\35 interest in the well, the battery was owned 97% by CR.

Some of the difficulties encountered in the operation were due to poor procedures followed by the drilling contractor and for which the contractor acknowledged responsibility. Duce's allegations that other problems were the result of CR's negligence were all rejected by the trial judge.

Duce refused to pay for the cost overruns to the original AFE. Duce also argued that it was not responsible for the costs of installing packers, or the screw pump and claimed that it should not be responsible for full battery costs. CR gave Duce a default notice under the CAPL and subsequently commenced this action seeking an order requiring Duce to pay the balance of its share of costs and a declaration that it held a builders' lien against Duce's interest in the property and assets located on the lands.

Justice Pritchard found in favour of CR on all grounds in *Coachlight Resources Ltd v. Duce Oil Ltd*, [1999] SJ 122 (QB). Thus the court found that Duce, who was fully consulted all along, consented both to the drilling of three different legs and to the installation of the packers and was therefore liable for all costs notwithstanding the fact that the original AFE contemplated neither the installation of packers nor the drilling of multiple legs. Drilling of the second and third legs was justified on the basis that the first two legs deviated outside the target zone and therefore did not result in the type of well contemplated by the original AFE.

The operation to install a screw pump stood on a different footing since this occurred after CR had served the default notice. Justice Pritchard accepted CR's proposition that a joint operator in default was not entitled to "any further information or privileges" (CAPL 505(b)(i) and that therefore "CR was entitled to install the screw pump without consulting with its defaulting Joint-Operator who was also not entitled to approve the AFE for the ... operation". In my view this particular decision is incorrect since it conflicts with the basic principle that an operator can only conduct an operation for the joint account with the consent of all joint operators unless the operation will cost less than $25,000 or unless the operation is necessary to protect life or property.

The 1981 CAPL form states that where there is an AFE cost overrun of more than 10%, the operator shall "forthwith" advise the joint operators and submit a written supplementary AFE to them "for their approval". The court found that CR had satisfied both of these requirements. Although there was some delay in submitting the supplementary AFE this was explained by the fact that it was necessary for CR to negotiate with the drilling contractor to ascertain by how much its invoice should be reduced. In the circumstances, the supplementary AFE was issued as soon as was practical. Furthermore, once issued, Duce was obliged to approve the supplementary AFE to the extent that it covered additional operations or cost overruns that Duce had already approved of orally in the actual course of the operation. This represents a pragmatic solution to the poor drafting found in the 1981 CAPL but it may conflict with the agreement's requirement of a written supplementary AFE.

CR was not in breach of its fiduciary duty to Duce in continuing to operate a marginal well while perhaps benefitting disproportionately through its profit margin on battery operations in which it had the dominant interest. By continuing to produce, CR was preserving the underlying lease for the benefit of both parties. Furthermore, it was not unreasonable for CR to charge fees based upon total emulsion volumes rather than on oil volumes.

Finally, the court held that in default of payment within the prescribed time, CR was entitled to filed a builders' lien against Duce's interest in the property.

First Nation entitled to a share of the Crown's net profits interest in Norman Wells

Under the Sahtu Land Claim Agreement, government agreed to pay the Sahtu a per centage of Crown resource royalties. The Agreement defined royalty as meaning "any payment, whether in money or in kind, in respect of production of a resource ... including the Norman Wells Proven Area ..., paid or payable to government as owner of the resource, but does not include any payment for a service, for the issuance of a right or interest or for the granting of an approval or authorization." Did this include the right to share in the Crown's one third net profits interest under the terms of the 1944 Proven Area Agreement (PAA) of 1944 between Canada and Imperial Oil? Yes, answered Justice Dube. The net revenues were payable in respect of production. A payment with respect to the production of a resource is not confined simply to the resource. It includes the plethora of processes involved in extracting the minerals including surveying, drilling, extracting and storing the product. Furthermore, the monies were also payable to Government as owner of the resource since under the PAA it was clear that Canada owned one third of the production.

The decision in *Sahtu Secretariat Inc. v. Canada* [1999] FCJ 121 (TD) is specific to the terms of the Sahtu agreement but it may also have implications for the revenue sharing provisions of other northen aboriginal land claim agreements.

Two decisions on set-off and the duty to mitigate damages

The bankruptcy of Nesi, a natural gas broker has already generated a series of interesting decisions. See this *Newsletter* Vol. XV, No. 3. Here are two more. The more important of the two is *Nesi Energy Marketing Canada Ltd (Trustee of) v. NGL Supply Gas Co.*, [1999] AJ 116. At the time of its bankruptcy Nesi held purchase and sale agreements with each of the claimants for the purchase and sale of natural gas. In each case there was a master agreement accompanied by schedules for each individual buy or sell transaction, each of which constituted a separate contract. Since the price of gas was higher at the time of Nesi's default than that fixed in the schedules, it followed that the claimants would gain on sell-side transactions by selling gas to others at the market price but would lose on the buy-side transactions since they would have to arrange alternative supplies at higher market prices. The claimants filed claims with the trustee seeking to recover all their losses on the buy-side without taking account of gains on the sell-side. The trustee brought this application to limit Nesi's liability to the net losses of the claimants. The trustee's failed to establish set-off but the court still held that the claimants were obliged to net the gains and losses as part of the duty to mitigate damages in contract law.

Set-off failed for the simple reason that Nesi had no cross-claim against the claimants. The court held that while the duty to mitigate does not extend to wholly independent or collateral benefits received by the innocent party in the event of breach, this was an appropriate case to take account of the gains made by the claimants. There was a close connection between the gains and the losses. They were not independent or disconnected events but instead were traceable to the same default. The claimants could not have made the gains they did but for Nesi's default.

The defendant's set-off argument also failed in *Compton Petroleum Corp. v. Alberta Power Ltd.* [1999] AJ 218 (QB). The facts in this case had Nesi acting as an undisclosed agent for Compton as principal in a gas sales agreement to AP. AP argued that it could set-off monies owed by it to Nesi against monies owed by Nesi to AP's affiliate, Canadian Utilities (CU). Justice Paperny rejected that contention noting that there was no agreement to set-off only a unilateral claim by AP. Furthermore there could be no set-off at law since there was no mutuality (CU and AP were different persons and there was no reason to pierce the corporate veil) and in any event it was not clear that CU's claim against Nesi was a claim for a liquidated amount.

Following Nesi's bankruptcy, Compton entered into a direct sales agreement with AP and continued to supply AP with gas until it became clear to Compton that AP would rely upon its set-off argument. AP took the view that Compton breached the new agreement by interrupting the supply of gas but the court held that AP had repudiated the contract by refusing to pay Compton for gas received. Compton was entitled to and had accepted that repudiation and as a result was entitled to the amount owing for gas actually delivered.

A distinction without a difference. The registrar's power to correct and the running of time against the innocent victim: *Liebing et al v. North Alberta Land Registration District* [1999] AJ (QB)

The Municipal District of Melrose took HCL's land for non-payment of taxes and transferred title to RL

including the mines and minerals in 1944. RL sold the land (including the miens and minerals) to King and subsequently the registrar purported to revive the HCL mineral title and to correct the King title by adding a notation reserving out the mines and minerals. Although King's lawyers protested this correction shortly thereafter they made no further claim to the mineral estate until the HCL interests sought to have a registrar's caveat removed from title. The registrar had filed his caveat in 1977.

The facts are remarkably similar to those of *Krautt v. Paine* [1980] 6 WWR 717 (Alta. CA) a case that stands as authority for the proposition that a person in King's position who purchased on the faith of the register cannot be deprived of his mineral title.

Justice Rawlins however held that Krautt was distinguishable on limitations grounds. She held that the King interests ought to have asserted their claim (which in her view was an action for the recovery of possession of land (*contra* Justice Rand in *Turta v. CPR* [1954] SCR 427)) within 10 years of the date of discovery of the error. If King was put of time, so too was Krautt. Alternatively, the action should have been commenced within 10 years of the filing of the registrar's caveat.

There are a number of difficulties with this decision. First, it is very hard to distinguish *Krautt* since the facts in Krautt show that the Krautt interests were well aware of the fact that the registrar had corrected their title; the registrar recalled the Krautt duplicate certificate of title for the express purpose of making the correction. Second, the alternative ground that the registrar's caveat could somehow both revive the King interest and start time to run against King is not supportable. A caveat cannot create an interest and since the registrar's caveat is designed to protect third party interests it seems odd that it should be used in this way to prejudice them. Third, the bulk of authority favours the view that it takes physical acts inconsistent with title to cause time to run against a person who "loses" an interest as a result of a registrar's correction. Certainly, it needs something more than payment of taxes or the grant of an oil and gas lease for the interest to be an adverse interest: *Turta, supra* and *Re Panther Resources* (1984), 29 Alta. LR (2d) 220 at 231 - 234) Fourth, as between the King and HCL interests, the equities actually favour King. King was a purchaser for value. Once he was on title the HCL interests had no right to get the mineral interest back. It was the HCL interests who were the volunteers here as Justice Kerans so perspicaciously recognized in *McWhorter v. Registrar (North Alberta Land Registration District)* (1989), 67 Alta. LR (2d) 71. If anyone was out of time it was the HCL interests who should have brought an action for damages against the assurance fund after they lost the right to have their mineral title restored.

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

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