

## REGULATORY TRIBUNALS AND ABORIGINAL CONSULTATION

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Implicit in the title of this talk<sup>1</sup> is the idea that there is a duty of consultation. In developing my remarks on that topic I want to address four questions:

- Why is this question arising now?
- What is the source of the duty of consultation?
- Upon whom is the duty imposed?
- How do regulatory tribunals fit into this picture?

### 1. Why is the question arising now?

There is nothing novel about the observation that new energy projects may have dramatic impacts upon First Nation and other aboriginal communities. Similarly, there is nothing novel about the observation that federal and provincial regulatory tribunals ought to take account of these impacts when deciding whether or not to recommend that a project be approved as being in the public interest or meeting a test of "public convenience and necessity".

One need only reflect for a moment on the first generation of ERCB (Energy Resources Conservation Board) approvals for tar sands plants in the Fort McMurray area in the late 1970s or the NEB's (National Energy Board) 1977 Northern Pipeline Decision and its 1981 Norman Wells Pipeline Decision to confirm the commonplace nature of both of these observations.

That said, we might also recall that in the case of the Alsands project, the ERCB declined to include conditions in the project approval to deal with social and economic conditions for the benefit of aboriginal people and both the Alberta Court of Appeal and the Supreme Court of Canada confirmed that the Board lacked the jurisdiction to do so on the grounds that the relevant statutes were concerned exclusively with "energy resources and energy".<sup>2</sup> The *Energy Resources Conservation Act* was subsequently amended to instruct the Board to take account of the social and economic effects of projects as well as the effect on

the environment.<sup>3</sup>

What then has changed to make the topic of regulatory tribunals and aboriginal consultation such a hot topic? Why was the NEB, just over a year ago, moved to issue a Memorandum of Guidance (MOG) on the topic of "Consultation with Aboriginal Peoples";<sup>4</sup> a document, at least some paragraphs of which, the Canadian Association of Petroleum Producers regards as "untenable in the extreme". The short answer is of course the constitutional protection of aboriginal and treaty rights as of 1982 and the belated recognition that the Crown owes a fiduciary duty to the aboriginal peoples of Canada.

But why has it taken 20 years from the date of constitutional entrenchment for it to become a burning issue? The answer is that we are still working through the full implications of the constitutional protection of aboriginal and treaty rights. This is an ongoing interpretive task in which the courts play the leading role.

### 2. What is the source of the modern duty of consultation?

One might say that there has always been a duty of consultation. After all, if you're going to do work in someone's back yard, in their traditional territory, fundamental fairness demands that you go and talk to them – right? Traditionally we have reflected this idea by imposing upon administrative decision-makers the duty to provide notice and generally to adhere to the rules of natural justice and procedural fairness.

But it is apparent that the duty of consultation that we are talking about now is a different kettle of fish. It is much harder edged for one thing and it has a proactive and substantive content that goes well beyond mere notice. While I cannot afford to talk in detail about the content of the duty I think that a particularly useful formulation of the





## RÉSUMÉ

L'État est dans l'obligation de consulter les peuples autochtones lorsqu'il envisage de disposer de ses ressources ou de prendre des décisions réglementaires qui pourraient porter atteinte aux droits ancestraux ou issus de traités des autochtones ou au titre aborigène. Cette obligation se fonde sur l'article 35 de la *Loi constitutionnelle de 1982* et sur l'arrêt *Sparrow* de la Cour suprême du Canada. L'État ne peut pas échapper à cette obligation en choisissant de s'organiser sous forme de tribunaux quasi judiciaires tels que l'Office national de l'énergie (ONÉ) ou le Alberta Energy and Utilities Board (AEUB) pour fournir des services ou prendre des décisions réglementaires. Par ailleurs, un rôle actif de consultation et de conciliation semble incompatible avec un rôle quasi judiciaire. Comment ces organismes devraient-ils résoudre ce dilemme? L'ONÉ l'a fait en exigeant des requérants qu'ils fournissent la preuve que l'État s'est acquitté de son obligation de consulter. Pour sa part, l'AEUB souligne qu'il s'est acquitté de ses obligations statutaires mais refuse de traiter de la question constitutionnelle.

content is found in Justice Finch's judgement in the *Halfway River case*.<sup>5</sup>

"The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interest and concerns, and to ensure that their representations are seriously considered and, wherever possible demonstrably integrated into the proposed plan of action."

In short there is a duty to accommodate.

But what are the origins of the duty?

One might think that it should be easy to answer that question; I've already suggested that the answer is found in the *Constitution Act, 1982*. But it isn't as simple as that. The word consultation is not mentioned in s. 35. That section simply reads that the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

So what is the source of the duty? The source of the duty is the Supreme Court of Canada's decision in a case called *Sparrow*.<sup>6</sup> *Sparrow* said that the constitutional protection of aboriginal and treaty rights must be taken seriously but that did not mean that such rights were absolute – "no rights are absolute", said the Court. Since such rights are not absolute they may be infringed by a constitutionally competent government, provided that it can justify doing so.

*Sparrow* established a two stage justification test that applies whenever a person seeking to rely on s. 35 established a case of *prima facie* infringement. Step one requires that the Crown establish a legitimate purpose for the infringing legislative or regulatory measure. Step two demands that the Crown demonstrate that the infringement is consistent with the honour of

the Crown and the fiduciary nature of the relationship between the Crown and the aboriginal peoples of Canada. There are other important elements to step two of the justification procedure but for present purposes I need only emphasise that it requires that the Crown establish that it has consulted with the affected aboriginal peoples over the impact of the regulation or decision.

There is of course a well-known snag with this way of formulating the basis of the duty to consult – put bluntly, it is ass backward. It seems to suggest that the duty to consult only arises when the aboriginal party proves the existence of an aboriginal or treaty right and its infringement – and yet surely we want to trigger the duty to consult earlier than that so as to avoid or minimize the infringement of constitutionally protected rights. While there are exceptions (e.g., the Ontario Court of Appeal's decision in *TCPL v. Beardmore*<sup>7</sup>) the bulk of the case law accepts the logic of this critique and stipulates that the duty is triggered when the Crown proposes to take some regulatory or other action that may infringe or impair a claimed aboriginal or treaty right or title.<sup>8</sup>

### 3. Upon whom is the duty imposed?

The duty is principally imposed upon the Crown. I am going to put to one side the B.C. Court of Appeal's controversial judgement in *Haida Nation v. Weyerhaeuser*<sup>9</sup> which suggests that a private party may also have a duty to satisfy themselves that the Crown has properly fulfilled its obligations and may have a more direct obligation to justify its own actions.

But who is the Crown? What do we mean by that term? I could at this point launch into a long dissertation about the Crown in right of Westminster, in right of the provinces and in right of Canada; I might talk about how the numbered treaties including Treaty 7 were negotiated between the various tribes and "Her Most gracious Majesty the Queen of Great Britain and Ireland"; and I might talk about the distinction between the Crown in parliament and the Crown acting in its executive capacity, but I think that your





eyes would all glaze over. So, to cut to the chase, I think that the term "Crown" at least in this context simply means government and means whichever level of government (federal or provincial) either has, or claims to have, *de facto* or by law, the power to infringe or impair aboriginal or treaty rights. To paraphrase the court in *Sparrow* – along with the power goes the duty. So, for example, if the provincial Crown proposes to issue new timber harvesting rights in the traditional territory of a First Nation (*Halfway River*) it triggers a duty of consultation.

#### 4. So, how does this duty implicate regulatory tribunals?

How does this implicate energy regulatory tribunals like the AEUB and the NEB? Let me begin with a couple of observations. The first observation is simply that governments can elect to organize themselves in different ways.

- They can organize themselves in a unitary way (western Canada at the time of Treaty 7)
- They can organize themselves in a federal way (the creation of Alberta and Saskatchewan in 1905)
- They can organize themselves in some devolved way – the current territories Yukon Territory, Northwest Territories and Nunavut Territory provide examples.

Furthermore, these governments, may order themselves internally for the purposes of delivering services, regulating industry, or even by deciding to assume ownership of the means of production, distribution and exchange (to advert to a now much maligned way of organizing government and the economy).

To be even more precise, governments may elect to regulate an industry by using a line department of government or by using a so-called arms' length quasi judicial tribunal to regulate the industry. There was regulatory life before the AEUB (the Alberta Energy and Utilities Board, the successor to the ERCB) and the NEB and there will continue to be regulatory life afterwards. Some governments still elect to regulate, for example, the upstream oil and gas sector more directly than does Alberta (think of BC even with the BCUC (British Columbia Utilities Commission) and the BCOGC (British Columbia Oil and Gas Commission)) and Yukon.<sup>10</sup>

Now I take it simply as a given that the Crown, the government, should not be able to avoid its constitutional responsibilities simply by the way it organizes itself internally. If you want to think of a loose analogy, Canada cannot avoid its commitments, its international responsibility, under the Kyoto Protocol by arguing that some of the required implementation measures fall under provincial jurisdiction.

The second broad observation is that while no person is above the law and the Constitution, the courts are ultimately the supreme

arbiters of what the law and the Constitution actually mean and the Constitution needs to recognize this special role. Suppose, for example, that a Court is just about to make a decision to the effect that a treaty right was extinguished by a pre-1982 federal enactment. Does the court itself have to fulfil its own *Sparrow* justification tests? Does the Court have to engage in a consultation exercise before rendering its decision? The answers are clearly "no" for that would be incompatible with the judicial **interpretive** role and the separation of powers within a constitutional democracy. Similarly, if the Crown owes to aboriginal peoples a fiduciary duty, and implicit in the idea of a fiduciary duty is the idea of undivided loyalty (i.e., the duty to act in the best interests of the other person rather than your own interest, or indeed the interest of anybody else), it is surely self evident that such a duty could never be compatible with the judicial role.

What are the implications of these observations for bodies that look like courts, i.e., quasi-judicial tribunals like the AEUB and the NEB? They do, I think point us in somewhat different directions. The first observation seems to suggest that the internal organization of government is constitutionally irrelevant, while the second observation suggests that certain duties cannot be expected of those who fulfill certain roles. How have the AEUB and the NEB responded to this dilemma?

First, the NEB.

I suspect that everybody in the room is aware that the NEB responded to this dilemma last March by issuing its Memorandum of Guidance. The MoG was very much based upon an earlier 1994 decision of the Supreme Court of Canada known as the *Hydro Quebec* case or the *Grand Council of the Crees* Case.<sup>11</sup> In that case the Grand Council argued that the NEB owed it a fiduciary duty in considering applications for export licences.

The Supreme Court rejected that argument on the grounds that it was inconsistent with the quasi-judicial role of the NEB. However, the court did confirm that "the [NEB] must exercise its decision-making function, *including the interpretation and application of its governing legislation*, in accordance with the dictates of the Constitution, including s. 35(1) of the *Constitution Act 1982*" and it appeared to accept that the Board needed to consider whether issuance of a licence might constitute an unjustifiable infringement of an aboriginal or treaty right.

How then should the NEB discharge these duties? In its MoG the NEB took the view that:

"the Board will require applicants to clearly identify the Aboriginal peoples that have an interest in the area of the proposed project and to provide evidence that there has been adequate Crown consultation where rights ... may be infringed if the Board approves the applied for facilities."





The Board went on to say that it therefore expected applicants to contact the relevant Crown departments to ensure that the requisite obligations had been fulfilled.

I think that the NEB has got this just about right and I say this for a couple of reasons. **First**, the NEB has clearly accepted its responsibility to make a determination that its regulatory approvals do not bring about an unjustifiable infringement of aboriginal or treaty rights or title. Although the Board focuses on consultation, the implications of the MoG are broader in terms of the overall scope of the *Sparrow* tests. **Second**, the Board is effectively saying that it cannot proceed absent appropriate evidence. I do not think that the Board is saying to applicants that this is the only way in which they can prove their case. For example, the Crown itself, through appropriate Departmental witnesses, might choose to lead evidence or be persuaded to do so by the applicant or an intervener. And the NEB is certainly not saying to the applicant that it is the applicant that must actually conduct the consultation. What the Board is saying, and to the one entity under its jurisdiction, the regulated company, is that you must make sure that the record demonstrates evidence of consultation where appropriate. If you fail to do you run the risk that we will deny your application.

And now to the AEUB.

The AEUB has not issued an MoG or its equivalent. Instead, it has, through its decisions endeavoured to send the message that the EUB is not the forum within which to resolve questions of aboriginal and treaty rights.

Unlike the NEB, the AEUB does not appear to have interpreted the Supreme Court's message in *Hydro Quebec* as requiring it to change the way in which it does its business. I think that I can illustrate this point by referring to the AEUB's most recent relevant decision, CNRL's application for approval for an oil sands scheme in the Cold Lake Area.<sup>12</sup> Intervening in that application were two Treaty 6 First Nations (Frog Lake and Kehewin Cree). In their submissions the First Nations asked the Board: (1) to engage in its own consultations, (2) to suspend its decision until the Alberta Crown had fulfilled its duties of consultation, and (3) to include relevant conditions in any approval.

The Board took the view, reasonably enough in light of *Hydro Quebec*, that the first request was beyond the pale. Less reasonable however was its response to the second question. In my view the AEUB never really replied to that question and instead elected to answer another question of its own choosing, namely whether or not CNRL had complied with Guide 56 and whether or not there had been compliance with the procedural strictures of s. 26 of the *Energy Resources Conservation Act*.

"The Board is of the view that the consultation requirements applicable to these applications are those contained in the EUB's governing legislation and in Guide 56. The evidence

shows that CNRL complied with these requirements and, therefore, the Board has decided not to suspend its proceedings ... until further consultation with the FLFN/KCN by the EUB or the Crown takes place."

At no point does the AEUB ask itself the question: do our requirements fulfil our constitutional responsibilities? I think that the Board needs to reflect upon this question and needs to provide a reasoned response. I said earlier that the duty to consult is qualitatively different from the common law and statutory obligations of natural justice and procedural fairness, but the Board's decision ignores that distinction. It assumes that nothing has changed since 1982. This is a convenient assumption but in my view an incorrect assumption.<sup>13</sup>

## Notes

1. This is the text of a invited lunchtime speech to the Access Management: Policy to Practice, A Conference Presented by the Alberta Society of Professional Biologists, March 18-19, 2003, Calgary, Alberta. The text is unedited apart from the addition of key references.
2. *Athabasca Tribal Council v. Amoco Canada Petroleum Company*, [1981] 1 SCR 699.
3. S.A. 1992, c. E13.3; now R.S.A. 2000, c. E-12, s. 3. Whether the amendment has actually caused the ERCB/AEUB to change its approach is controversial. See my earlier comment on this matter in (1996), 53 Resources 1.
4. The MOG is available at:  
[www.neb.gc.ca/pubs/index\\_e.htm#ConsultationAboriginalPeoples](http://www.neb.gc.ca/pubs/index_e.htm#ConsultationAboriginalPeoples).
5. *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 9 W.W.R. 645 (B.C.C.A.), emphasis supplied.
6. *R. v. Sparrow* (1990), 70 D.L.R. (4th) 385 (S.C.C.).
7. *TCPL v. Beardmore*, [2000] 3 C.N.L.R. 153 (Ont. C.A.).
8. See in particular *Taku River Tlingit v. Ringstead* (2002), 98 B.C.L.R. (3d) 16 (B.C.C.A.); *Haida Nation v. British Columbia (Ministry of Forests)*, [2002] 2 C.N.L.R. 121 (B.C.C.A.).
9. *Haida Nation v. B.C. and Weyerhaeuser*, [2002] B.C.C.A. 462 (B.C.C.A.).
10. See the *Yukon Oil and Gas Act*, R.S.Y. 2002, c. 162.
11. *Quebec (A-G) v. Canada (National Energy Board)* (1994), 112 D.L.R. (4th) 129.
12. AEUB Decision 2003-013 issued February 11, 2003.
13. There is one outstanding decision of the Supreme Court of Canada which may be expected to offer some guidance to provincial regulatory tribunals on issues of consultation and the determination of legal questions that affect aboriginal and treaty rights. I refer to the decision in *Paul v. British Columbia (Forest Appeals Commission)*. The Court of Appeal's decision [2001] B.C.C.A. 411 sent very mixed messages; the Supreme Court allowed the appeal (June 11, 2003) indicating that written reasons would follow. Those reasons are not yet available.

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## RECENT DEVELOPMENTS IN OIL AND GAS LAW

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### The potentially broad scope of indemnity clauses

From time to time the argument is made that indemnity clauses are confined to covering the indemnified from damages suffered as a result of actions commenced by third parties (*Erehwon Exploration Ltd. v. Northstar Energy Corp.* (1993), 15 Alta. L.R. (3d) 200 at 222-224 (Q.B.) The argument draws strength from the Supreme Court of Canada's decision in a drilling case: *Mobil Oil Canada Ltd. v. Beta Well Service Ltd.* (1974), 43 D.L.R. (3d) 745 (Alta. S.C., App. Div., aff'd 50 D.L.R. (3d) 158 (S.C.C.)). Some forms of the argument almost seem to suggest that the proposition is a proposition of law and not just a rule of interpretation or a presumption. The Ontario Court of Appeal has firmly, and in my respectful view, correctly, scotched that notion in its decision in *TransCanada Pipelines Ltd. v. Potter Station Power Limited Partnership*, [2003] O.J. 1879, aff'g [2002] O.J. 429 and restored the proposition that the scope of an indemnity clause will always be a matter of construction.

The facts were that TCPL, the owner of an interprovincial pipeline system and a natural gas compressor station entered into a contract (1990) with Potter, pursuant to which Potter purchased lands adjacent to the compressor for the purposes of constructing a cogeneration facility and agreed to purchase waste heat from the station. Potter agreed to indemnify TCPL "from and against all liability, actions, claims, losses, costs and damages which may be brought against or suffered by TransCanada and which TransCanada may incur, sustain or pay arising out of or in connection with: (a) construction, operation and maintenance of the Facility ...".

In 1995 the lands on which the compressor was situated subsided causing damage to the compressor. TCPL sued Potter relying on the indemnity and alleging that the subsidence was caused by Potter removing groundwater from an underlying aquifer in order to operate its facility. Potter brought a summary judgement motion to dismiss the action on the basis that the indemnity clause only provided TCPL with an indemnity against claims by third parties and not an indemnity against damages suffered by TCPL directly. The Court of Appeal, affirming the judgement of Justice Lane at trial, dismissed the motion. The Court held that even admitting that the starting point for interpreting the words "indemnify and save harmless" was to assume that they applied only to third party claims, the clause in question contemplated that TCPL could claim

the indemnity both: (i) when an action was brought against TCPL, and (ii) when TCPL itself suffered damages. The latter clause was more apt to describe first party damage.

The court distinguished *Mobil Oil* both because of the precise words of the indemnity clauses at issue but also because the drilling contract at issue in *Mobil Oil* contemplated that the contractor would perform its work in a good and workmanlike manner, a standard of performance that was inconsistent with absolute liability on the part of the contractor.

### Another 1981 CAPL AFE cost overrun case

Canadian courts continue to struggle with the idiosyncratic language of the 1981 iteration of the standard form CAPL operating procedure which suggests on its face that a supplementary AFE is required in the event of cost overruns in order to bind joint operators to those additional expenses. Although one court has striven to avoid the inevitability of that conclusion through a very innovative interpretation of the plain language of the agreement (*Novalta Resources Ltd. v. Ortynsky Exploration Ltd.* (1994), 18 Alta. L.R. (3d) 4 (Q.B.)) the most recent case *Powermax Energy Inc. v. Argonauts Group Ltd.*, [2003] A.J. 433, [2003] A.B.Q.B. 71 follows an earlier decision (*Morrison Petroleum Ltd. v. Phoenix Canada Oil Co.*, [1997] A.J. 275, 198 A.R. 81 (Q.B.) in confirming the plain meaning of the text.

The facts in *Powermax* were as follows. Argonauts as the designated operator sent out a number of AFEs in April 2000 to authorize installation of a number of facilities at a jointly owned battery to provide for better separation of oil and water and conservation of solution gas. The AFE estimated costs at \$820,585 premised on purchasing parts, including a water knock-out facility, plus an amount for installation. After the AFE was executed, discussions ensued as to purchasing a used battery facility including a treater from FC instead. *Powermax* did not object and took the position that while the purchase cost of this facility was higher than it had approved in the AFE it had assumed that labour costs would be lower, i.e., by failing to object it was not consenting to a cost overrun.





For a variety of reasons, in particular the unanticipated need to spend significant sums on restoring the purchased compressor, Argonauts expended at least \$2.4 million on the work which was completed by no later than December 2000. No supplementary AFE was issued until January 9, 2001. Powermax met the original cash call for the AFE but refused to make further payments except under protest and reserving all rights. On several occasions Argonauts purported to exercise its cl. 505 operator's lien and sell Powermax's production to satisfy perceived indebtedness. Powermax sought a declaration that it was not liable for its share of the cost overruns. Justice Chrumka granted the declaration.

Argonauts was in breach of its clause 301 duties to consult with joint operators and to obtain *forthwith* a supplementary AFE for cost overruns exceeding 10%; there was also a change in the nature of the authorized operation. Powermax had neither expressly, impliedly, or by its conduct ratified or acquiesced in the expenditures. The fiduciary analysis, *infra*, also supported the conclusion that Powermax was not liable for cost overruns.

Argonauts exceeded its authority in purporting to claim and exercise lien rights and in selling Powermax's production. Argonauts could only exercise lien rights under cl. 505(b) of the CAPL which established the following conditions: Argonauts failed at the first hurdle since it seized production in order to satisfy cost overruns for which Powermax was not liable. It was also in breach of the explicit notice requirement.

Argonauts was acting in a fiduciary capacity in relation to Powermax in constructing the battery, in spending money for the joint account and in dealing with revenues belonging to Powermax and was the trustee of monies received both for AFE purposes and from the sale of production. Argonauts breached its fiduciary and trust duties by failing to make full disclosure to joint operators, by seizing and selling for its own account Powermax's share of production and resorting to self help remedies without first commencing an action for recovery of the monies.

Powermax was not unjustly enriched by being able to take advantage of the operation despite not being liable for its share of the cost overruns. If there was an enrichment the CAPL agreement provided a juristic reason for the enrichment. Similarly, Argonauts could not avail itself of claimed set-off rights because to do so was inconsistent with its status as a trustee.

Powermax was entitled to judgement for the amount of production revenues seized by Argonauts to meet the alleged cost overruns and additional damages arising from the fact that Argonaut's seizures meant that Powermax was unable to meet its commitments under firm service contracts and thus incurred penalties. The court declined to award the punitive damages sought (\$100,000) but did award solicitor client costs on a full indemnity basis. The court declined to grant punitive damages notwithstanding the facts that Argonauts incurred cost three times

those authorized by the AFE, that it failed to obtain prior authorization for these overruns and that it resorted to a self help remedy to reimburse itself for these overruns over the protests of Powermax and notwithstanding the court's characterization of this behaviour as both an intentional tort and an intentional breach of trust.

In conclusion, there were evidently all sorts of reasons for denying Argonauts the right to recover but insofar as the judgment also turns upon the plain meaning of the 1981 version of CAPL operators would be well advised to consider amending the 1981 version of this agreement to avoid this result.

### **A registered but expired oil and gas lease is not a clog on title**

In *Terry v. Nalliger*, [2002] B.C.J. 2213, [2002] B.C.S.C. 1383 the purchaser sought return of its deposit paid under a June 2001 contract of sale and purchase. The sale was never completed because of the actions of the purchaser but the purchaser nevertheless claimed to be entitled to the deposit on the grounds that the vendor was not able to fulfil the terms of the contract to deliver clear title since, registered against title, was a 10-year oil and gas lease dated January 30, 1988. The report does not disclose whether the lease was in the conventional form of a primary term with continuation thereafter for production or deemed production; instead, the court simply opined that this lease "even though registered against title, has expired by effluxion of time but had not yet been discharged or cleared from the title." The court held that the continued registration of the lease was a mere technicality and that the vendor could discharge the registration without the consent of any third party and accordingly the vendor was not in default and was entitled to retain the deposit.

### **GORs as interests in land: the continuing saga**

Every so often the appellate Courts take a bold step in systematizing the law and offering guidance to the lower courts. One such decision was the Alberta Court of Appeal's decision followed by the Supreme Court of Canada in *Bank of Montreal v. Dynex Petroleum Ltd.*, [2002] S.C.R. aff'g [2001] 2 W.W.R. 693. I commented on that decision at Vol. XIV No. 1 at 16 (2002). The court there held that a gross overriding royalty (GOR) and a net profits interest (NPI) were capable as a matter of law of subsisting as an interest in land provided that the parties creating the interest manifested their intention to do so. But there was a snag. All that was before the court was the pure point of law and while the decision is relatively easy to apply on a go-forward basis, what did it mean for existing agreements?

The matter was sent back to trial for a consideration of the





particular agreements in question to determine if the royalties thereby created were interests in land and therefore binding upon the purchaser from the trustee in bankruptcy or whether, in the alternative, the GOR holders might have some claim against the Bank. There was surely reason to hope that the breath of fresh air that animated the Court of Appeal's judgement would also animate the judgement at trial on the merits. There was also reason to hope that the trial judgement would build upon the guidance offered by the senior courts and provide some clear indication of how to deal with existing agreements. The result is disappointing.

In a judgement handed down on March 14, 2003, *Bank of Montreal v. Dynex Petroleum Ltd.*, [2003] A.B.Q.B. 243, Justice Hawco has ruled that the while the interests out of which the GORs and NPIs were carved did amount to interests in land, the GOR and NPIs do not constitute interests in land and that therefore the royalty owners will have to find some alternative basis for claiming against the Bank of Montreal. In reaching his conclusion, Justice Rooke chose to emphasise that the agreements provided that the grantor was to pay or cause to be paid a royalty; the agreements did not provide a right to take in kind, and only one of the agreements was protected by a caveat.

I believe that the decision is flawed for a number of reasons. First, by fastening on the obligation to pay and the absence of a right to take in kind Justice Hawco, despite his protestations to the contrary, really is taking us back to the bad old days when the courts haggled over prepositions: see, for example, *Emerald Resources Ltd. v. Sterling Oil Properties Management* (1969), 3 D.L.R. (3d) 630 (Alta. App. Div.). I think that the Court of Appeal set its head against this approach not only in the earlier proceedings in this case but also in the Gross Royalty Trust Agreement (GRTA) litigation and most notably in Justice O'Leary's decision for the Court of Appeal in *Scurry Rainbow Oil Ltd. v. Kasha* (1996), 135 DLR (4th) 1. In my view, and admittedly in the context of a lessor's royalty, the Court in the GRTA cases has really said that the lessor's royalty is presumed to be an interest in land and that it will take some powerful expression of contrary intention to rebut that presumption.

Second, if a judgement is to provide real guidance for the future it needs to offer some more details in the form of supportive reasoning. For example, Justice Hawco seems to make much of the fact that only one of the GORs was protected by caveat. But what we do not know from this judgement is whether or not the caveat was available as a means to protect the interest. A caveat cannot be filed to protect a royalty carved out of a Crown lease and we know that at least one of these interests involved a Crown lease. Similarly, Justice Hawco makes a great show of quoting extensively from the royalty agreements but his quotations are necessarily selective and in any case we also need to know what the agreements did not provide for. For example, in the case of one GOR, Justice Hawco provides the calculation clause of the royalty but not the granting clause. In no case does he tell us what

the agreements provided for by way of an enurement clause and neither does he tell us whether the agreement contemplated the filing of caveats (something which is surely more persuasive than the actual filing of a caveat).

What might be a way ahead here? I think that we might begin by recognizing the implications of the commercial realities that Justice Hawco apparently acknowledges. Thus Justice Hawco goes out of his way to agree with Professor Ellis' much quoted observation to the effect that no one in the oil and gas business who thought about what they were doing would intentionally create a royalty that was a mere contract. Surely the implication of this is that this should be the presumed intention of the parties and that we should be looking for evidence of a contrary intention. It is true that we sometimes leave matters of presumed intention to the legislature but liens that arise by operation of law such as the vendor's lien for unpaid purchase monies are surely nothing more than a presumed intention to charge the land as security based upon the commercial realities of the situation.

While the *Dynex* agreements might present some difficult problems of characterization, others are more straightforward. A case in point is *Lorne H. Reed and Associates Ltd. v. ProMax Energy Inc.*, [2003] A.J. 774, 2003 A.B.Q.B. 774 in which Justice McIntyre gave summary judgement on a royalty claim. Although the judgement does not reproduce the exact terms of what Justice McIntyre described as a "full-blown GOR Agreement", McIntyre's summary refers to the following elements of the agreement: royalty secured by a lien on the payor's working interest, royalty and lien "shall be interest in land and shall run with the land" and the agreement was to bind heirs, successors and assigns, all as pointing to the conclusion that the royalty was clearly an interest in land.

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# RESOURCES

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## HUMAN RIGHTS AND RESOURCE DEVELOPMENT IN ALBERTA: WORKSHOP – OCTOBER 3 & 4, 2003

The Canadian Institute of Resources Law and the Alberta Civil Liberties Research Centre will hold a two-day workshop to consider some of the human rights issues which arise in connection with oil and gas development in Alberta. This event will be held on October 3-4, 2003, at the University of Lethbridge in Lethbridge, Alberta.

Increasingly, media reports are bringing to light disputes between petroleum companies and those affected by their operations, both in Alberta and around the world. People are concerned about the potential impacts of resource development both on their health and on their way of life or culture. These health and cultural impacts are often framed as human rights violations.

The objective of this workshop is to enhance understanding of the legal basis for framing health and cultural impacts of resource development as human rights issues and of the opportunities for advancing human rights claims of this kind in the resource development process. The workshop will examine the legal foundation (in domestic and international law) for human rights-based claims to a right to health or a right to cultural integrity. It will also consider the existing judicial and administrative mechanisms for advancing such human rights claims in the resource development process in Alberta.

If you would like to receive more detailed information about this workshop, contact Pat Albrecht at telephone 403.220.3974, fax 403.282.6182, e-mail palbrech@ucalgary.ca or visit the Institute's website at www.cirl.ca.

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THE INSTITUTE

The Canadian Institute of Resources Law was incorporated in September 1979 to undertake and promote research, education and publication on the law relating to Canada's renewable and non-renewable natural resources.

The Institute was incorporated on the basis of a proposal prepared by a study team convened by the Faculty of Law at the University of Calgary. The Institute continues to work in close association with the Faculty of Law. It is managed by its own national Board of Directors and has a separate affiliation agreement with the University of Calgary.

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