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The ten biggest legal and regulatory developments for the oil and gas sector from the first decade of the new millenium

By Nigel Bankes

Unlike my colleagues I was not prepared to plump for just one case or event and so here are my thoughts on ten notable legal and regulatory events for the oil and gas sector in Alberta over the first decade of the millennium. They are in no particular order; I tried to group some together thematically but some are just here in the order in which they came to mind.

1. The Alberta provincial royalty review

I suspect that the provincial royalty review would be at the top of most lists in the industry, but most will be excoriating it; both the review itself and the hapless Stelmach government that foisted it upon the industry. I was one of the few people who celebrated this review. See my ABlawg posts: Alberta's Royalty review and the law of grandparenting, Royalty Changes in Alberta: Why are we waiting? (to the tune of "O Come All ye Faithful"), and The sky is falling: let's blame the royalty review.

I celebrated the review because I thought it represented a fairer sharing of risk and economic rent between producers and governments; I thought it made sense to eliminate special programs and to tie royalty, as much as possible, to net profitability. I also liked the process. I liked the fact that, for once, the government let go and conducted an open, expert review of provincial royalty policy and royalty collection instead of conducting the review behind closed doors with industry participants. Unfortunately, I suspect that this is the last openness that we will see for some time and I expect that the "competitiveness" review will likely put more money into private pockets rather than the public purse, all in the name of discredited trickle-down economics.

And I am unrepentant. The timing was awful but the process and the content were both good.

2. The royalty trust policy reversal

Almost on a par for some in terms of government betrayal was the changed federal tax treatment of royalty trusts. But from my perspective here was a case where the federal government finally came to its senses and realized that it was bad public policy to create such a strong incentive for exploration and production companies to distribute as much of their earnings as possible rather than retaining a portion to fund ongoing exploration and development.

3. Provincial climate change policy and the specified gas emitter regulations

Canada continues to thumb its collective nose at the Kyoto Protocol and the rule of (international environmental) law. Alberta is clearly part of the problem and remains committed to an emissions intensity approach to emission reductions notwithstanding Canada's international commitments under Kyoto to an absolute emissions reduction. However, Alberta did pass climate change legislation in 2003 (the *Climate Change and Emissions Management Act*, S.A. 2003, c. C-16.7) as well as the *Specified Gas Emitters Regulation*, Alta. Reg. 139/2007. The default price of carbon under these regulations is still far too low ($15 per ton), but this was a step in the right direction.

4. Federal regulation of the NOVA system

The natural gas gathering system developed in Alberta under the auspices of AGTL and then NOVA from the 1950s onwards. It was a key part of the province's industrial strategy for several decades, but in February of this year the provincial government gave up the ghost and the NOVA system came under federal National Energy Board regulation, not with a bang but with a whimper. See my ABlawg post "TransCanada's Alberta Pipeline System now under federal regulatory authority".

5. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388

The decade saw several important aboriginal law decisions across the country. While *R. v Marshall; R. v Bernard*, [2005] 2 SCR 20 may be the most important decision of the decade in terms of aboriginal title, there can be little doubt but that *Mikisew Cree* is the most important numbered treaty case of the decade. Indeed, in an earlier comment I described it as the most important numbered treaty case since *St Catherine's Milling and Lumber v. R* (1888), 14 App. Cas. 46 (JCPC): "Mikisew Cree and the Lands Taken Up Clause of the Numbered Treaties" (2006), 92/93 Resources 1 - 8. The principal significance of the case is that it confirms that the power of the provincial Crown to take up lands for a variety of resource development purposes including oil sands developments is not an unlimited power and is subject to judicial supervision on both procedural and substantive grounds. On *procedural* grounds the case draws on the duty to consult and accommodate articulated in *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 and on the *substantive* grounds the case offers at least some reasons for thinking that there are hard limits to the provincial power to take up lands for development purposes. And therein lies its significance for the oil and gas industry.

6. *Bank of Montreal v. Dynex Petroleum Ltd* [2002] 1 S.C.R. 146

There was a time when oil and gas cases were two-a-penny before the Supreme Court of Canada. Alberta son, Justice Martland, decided many of them. But it is now very rare for oil and gas cases to get leave. *Dynex* did and in this case Justice Major, another Alberta son, confirmed that a gross overriding royalty can be created as an interest in land; whether it is (or not) in any particular case is largely a matter of the intentions of the parties. While the lower court decisions

implementing the ruling in this case in relation to pre-*Dynex* agreements are a mixed bag, at least the rules are now clear on a go-forward basis for those who want to create a royalty that is an interest in land.

7. *Anderson v. Amoco Oil and Gas*, [2004] 3 S.C.R. 3

The only other oil and gas case to reach the SCC during the decade was the phase gas case. In that case, the SCC, in another judgement authored by Justice Major, reached back to *Borys v CPR*, [1953] 2 D.L.R. 65 (JCPC) to confirm that the ownership of various substances in a reservoir was to be determined on the basis of original conditions before production commenced. Thus, if gas was in solution in the reservoir at the time of the first well, all of that solution gas was owned by the owner of the petroleum rights and ownership does not pass to the owner of the gas rights if gas comes out of solution in the reservoir or in the production casing as the pressure in the reservoir is reduced as a result of production. Still to be decided is the duty of the petroleum owner to account to the gas owner for any of the gas owner's gas that the petroleum owner produces and sells.

8. Ownership of CBM

Non-conventional gas has been one of the stories of the decade. While shale gas is currently the darling of the media, a significant issue in Alberta during the decade has been the ownership of coal bed methane (CBM). In cases of split mineral titles, is the CBM owned by the coal owner or the gas owner? Perhaps surprisingly the Energy Resources Conservation Board (ERCB) got to roll the dice first in what may prove to be a long game. In its decision (Decision 2007-024: Bearspaw Petroleum Ltd., Devon Canada Corporation, and Fairborne Energy Ltd., Part 2 of Proceeding No. 1457147- Review of Certain Well Licences and Compulsory Pooling and Special Well Spacing (Holding) Orders in the Clive, Ewing Lake, Stettler, and Wimborne Fields, March 28, 2007) the ERCB sided with the gas owners. EnCana (as an important coal owner) has now picked another fact pattern to litigate this issue before the Court of Queen's Bench and this matter is ongoing: see *EnCana Corporation v. Devon Canada Corporation*, 2009 ABQB 429 and *Encana Corporation v. Devon Canada Corporation*, 2008 ABQB 232). And perhaps that is where Encana should have started.

9. The oil sands

It would be hard to quit this listing exercise without at least some mention of the oil sands, Alberta's opportunity and nemesis. The oil sands figured in legal and regulatory developments in the province in all sorts of ways over the decade, some already mentioned above. "Conservation" of oil sands led to prolonged regulatory proceedings and litigation in the "gas-over-bitumen" matters; oil sands figured in a significant way in the royalty review; expanded production of both in-situ and mineable oil sands creates Kyoto compliance nightmares; oil sands tailings ponds create traps for migratory birds (see e.g. the ABlawg post of my colleague Shaun Fluker, R. v. Syncrude Canada: The Case of The 500 (or was that 1600) Dead Ducks); water demands for oil sands plants give rise to concerns as to minimum flows on the Athabasca; and reclamation plans

look like pipe-dreams. As to the latter I suspect that one development during the decade that will prove to be significant is the adoption by the ERCB of Directive 074: Tailings Performance Criteria and Requirements for Oil Sands Mining Schemes in February 2009.

10. The AEUB divorce

It seems that the marriage between the Public Utilities Board (PUB) and the Energy Resources Conservation Board (ERCB) was never a happy one. In any event, less than 15 years after first vows, the province severed the union in 2008 reviving the ERCB and renaming the PUB as the Alberta Utilities Commission. I do not suppose that anybody will mourn the old board which had thoroughly disgraced itself in hiring a private security firm to spy on intervenors in a transmission line hearing. See my colleague Alice Woolley's article on this in (2008), 26 Journal of Energy and Natural Resources Law 234 - 266. But the resurrected ERCB has not been free of difficulties as the new Board has had to deal with the mess resulting from a personal relationship between a Board staffer and an employee of an applicant that arose in the course of a hearing: see the Sullivan Proceeding (March 12, 2009).