

Energy's Westward Shift

With increased interest in liquid
natural gas over traditional oil,
BC may be set to challenge
Alberta in the energy law game

BY ANTHONY DAVIS

S **ANDY CARPENTER HAS** two western offices with Fasken Martineau DuMoulin LLP: one in Calgary, one in Vancouver. As a leading practitioner in energy law and past president of the Canadian Energy Law Foundation, though, Carpenter is used to spending more of his time in Calgary, the hefty legal link to Alberta's oil patch.

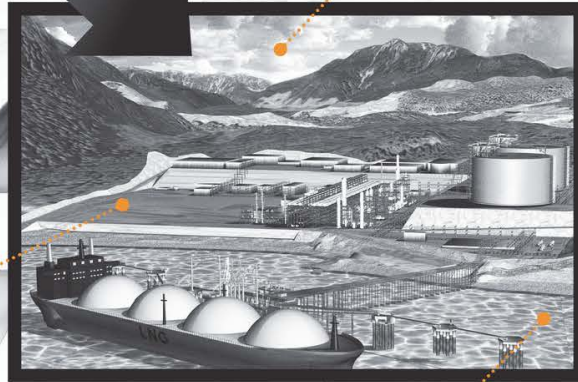
But Carpenter is also a leading Aboriginal lawyer, and lately a different fossil fuel has him burning up more time in Vancouver, as a potentially huge liquid natural gas (LNG) export industry that has been gestating for several years seems ready for imminent birth. "It's interesting how much is being written about (LNG) and yet, so far, there are no shovels in the ground," says Carpenter.

True, but there are big deals in the works.

Thanks to huge discoveries in the northeast part of the province, British Columbia may want to change its slogan from "Super, Natural ..." to "Super natural gas." Those finds, in places like the Montney and Horn River basins mean BC and Alberta are increasingly sharing traits that go beyond picturesque mountains. LNG development is shifting and expanding the landscape in both provinces for law firms



ALBERTA
THE TOTAL FOSSIL FUEL ROYALTY REVENUE (INCLUDING GAS, CONVENTIONAL OIL, OILSANDS AND BY PRODUCTS) TO THE GOVERNMENT OF ALBERTA IN 2011 WAS \$15.4 BILLION.



BRITISH COLUMBIA
BC'S TOTAL OIL AND GAS REVENUE IN 2011 WAS \$731.3 MILLION, BUT DEVELOPMENT OF LIQUID NATURAL GAS IS EXPECTED TO PRODUCE APPROXIMATELY \$20 BILLION IN NEW PRIVATE-SECTOR INVESTMENT IN THE PROVINCE.

THE KITIMAT
LNG FACILITY WILL BE LOCATED AT BISH COVE NEAR KITIMAT, BRITISH COLUMBIA

“... SHALE GAS IS not conventional production. It's more complex. And so it raises more environmental issues. It raises more First Nations consultations and government-relations issues than conventional gas production.”

with energy desks, prompting a tug-of-war between Calgary and Vancouver over the potential spoils. “There really is a shift in interest in the gas side from Alberta to BC,” says Chris Sanderson, a Vancouver-based partner in Lawson Lundell LLP’s energy and regulatory group.

Call it the frack factor. Thanks to ever evolving technologies in hydraulic fracturing, producers can now efficiently extract gas from solid rock in the huge shale plays in northeastern BC.

That’s good news for producers. The bad news: fracking has been so successful – not only in BC, but in the US – that a glut of supply and a dearth of buyers have nailed down the price of natural gas like Donald Smith’s sledgehammer on the last spike. At the time of writing, North American natural gas was trading for US\$2.88 per million British thermal units (MMBtu). But get that same gas to Asia, and it commands US\$12.75. So, with price multiples of 5x and 6x, it’s no surprise that the BC government is looking across the Pacific to power-hungry Asia for new markets.

To do that, however, you need to chill that BC natural gas to -162 Celsius, turning it into a liquid and shrinking it to a more portable 1/600th its original volume. Only then can the LNG, loaded on to special cryogenic tankers, be shipped to more lucrative offshore markets in China, Japan, Malaysia and elsewhere in Asia.

BC Premier Christy Clark – prophesying that LNG exports could add \$600 billion to the province’s GDP over the next 30 years and create 28,000 jobs – has thrown her arms wide open to oil and gas giants, inviting them to develop LNG infrastructure in BC.

Last June Clark even tweaked the province’s *Clean Energy Act* so companies could power any energy-sucking LNG plants they build on BC turf with their own natural gas instead of cleaner hydro, as the law had previously required.

Clark’s move only amped up the number of huge energy concerns – including the likes of Exxon, Shell and Apache – seriously contemplating major LNG projects



JANICE BUCKINGHAM
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 & HARCOURT LLP

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in BC. So far, not a single LNG plant has been built, though bulldozers are clearing land on the uninhabited Haisla No. 6 reserve for possible construction of a plant near Kitimat, BC. That plant, to be jointly owned by Apache Corp., Encana Corp. and EOG Resources, could be producing 5 million tonnes of LNG per year starting in 2015.

In total, three LNG plants are in the planning stages for BC. In addition to the Kitimat plant, the other two, if they are greenlit by the companies, are expected to be complete by 2020. Several others are rumored. As LNG plants are planned and built, corporate law firms in both Alberta and BC will reap significant work, say industry players such as Apache Canada Ltd.

“Development of an LNG industry in Canada has, and will continue to have, a very positive impact on the volume and quality of legal work undertaken in Canada’s energy sector,” writes Janice Buckingham, who represents Apache Canada Ltd., in an email. Buckingham is co-chair of the energy practice group in Calgary at Osler, Hoskin & Harcourt LLP. “Development of a new industry requires considerable external legal support over a prolonged period of time from a number of advisors with specialized expertise in developing major energy projects.”

Some skeptics counter that BC has come too late in the game to cash in on market differentials that may already be waning. In any event, before companies like Apache make the final decision to commit billions to LNG infrastructure, they’ll need to build a both a strong economic and *legal* underpinning to justify project risks, says Buckingham. “As a result, legal support is often concurrently required on a multitude of fronts.”

Those fronts include negotiating complex inter-partner agreements required to jointly own and develop gas reserves, pipelines and LNG facilities; going through the environmental application process; securing export licences from the National Energy Board (NEB); securing pipeline right-of-ways and land tenure rights for LNG plants; going through the environmental assessment process and securing First Nations support.

The only question is, will Alberta law firms, with their decades deep roots in major oil and gas in that province and around the globe, get the bulk of clients? Or will BC firms, with better bench strength in the environmental and Aboriginal issues unique to that province, still get a decent slice of the pie?

Lawson Lundell’s Sanderson thinks BC-based firms like his will, and he senses the shift already happening with some LNG

work shifting to Vancouver. Sanderson has been working with the LNG project near Kitimat. Earlier this year, it was the second LNG proposal to obtain the necessary permitting to go ahead with construction. Run by Texas entrepreneurs, it could start shipping LNG as early as 2014. "There is more room for, and indeed I think we are seeing more activity from, BC law firms in helping industry clients [navigate] the environment here," says Sanderson.

LNG PIPELINES WILL LIKELY CARRY NATURAL GAS FROM NORTHEAST BC TO KITIMAT AND PRINCE RUPERT.



"For one, shale gas is not conventional production. It's more complex. And so it raises more environmental issues. It raises more First Nations consultations and government-relations issues than conventional gas production. ... As Enbridge has discovered in a different context, BC is different than Alberta. And there are issues here which you need to look at through a different lens."

So, let's look at those different lenses, and examine how the legal experts in the energy, environmental and Aboriginal sectors expect BC's LNG work to be divvied up.

FIRST NATIONS FIRST

Allan Donovan founded Vancouver's Donovan & Company in 1996. He's practised Aboriginal law and represented BC First Nations for more than 20 years. It was less than a decade ago that the first LNG proposal he worked on for clients of the Haisla nation was an *import* facility, designed to bring Asian gas to North America. Now that same project is the aforementioned

\$15-billion Kitimat LNG venture that will *export* LNG, should it get the green light in a final decision expected by year end.

Donovan predicts BC law firms will have an edge over Alberta firms when it comes to Aboriginal negotiations over LNG projects, including the pipelines that will be needed to carry natural gas from northeast BC to the liquefying plants slated so far for Kitimat and Prince Rupert, BC.

In a province with 197 First Nation bands, "Only a small segment of BC has ever negotiated treaties with Aboriginals," says Donovan, outlining just one point that makes dealing with BC First Nations a different challenge from First Nations in other provinces. This is especially so for law firms based in other jurisdictions attempting to deal with one of the most delicate facets of LNG development on the west coast. "For most of the landmass of BC, with the exception of the northeast corner where

the oil and gas actually is, it's un-ceded Aboriginal title land."

"The bulk of the area where the pipelines go, across from the northeast of BC to Kitimat, are largely Aboriginal territories that are not subject to any treaty." Case law exists in BC that has established "un-extinguished" Aboriginal title on such lands, says Donovan. That makes it harder to fulfill corporate legal obligations to work things out with Aboriginal communities.

"There is no working out of the ground rules. What's Aboriginal land and what is government land? So you either have to do it the hard way, with anthropological and legal research, to figure out what the strength of claim is of various First Nation territories they'd be within, or do it the easier way by just sitting down with the First Nations and finding out what is their common interest."

Donovan contends that BC firms with relevant track records are those likely to be tapped by LNG clients to deal with Aboriginal issues. "It's a pretty critical area

that you just don't want to dabble in."

BC First Nations have a reputation, says Fasken Martineau's Carpenter, for being the most legally forceful Aboriginal communities in Canada. "We do run into Aboriginal issues in Alberta," says Carpenter. "But – and I haven't done a survey on this – probably for every Aboriginal case that comes out across the rest of Canada, 10 of them come out of British Columbia. And the Aboriginal groups in British Columbia are very focused on asserting and protecting their rights."

Lawson Lundell LLP used its bench strength in Aboriginal affairs to reel in Texas firms coming into BC for the first time to explore and drill for natural gas, says Sanderson. They "recognize that the first thing they want to do is gain a competitive advantage by making arrangements with affected First Nations and enlisting their support for development. That's been quite a creative and useful strategy. They will come to firms like ours on the basis that that's turf we know. And it's very much a local issue."

Adds David Holgate, senior counsel with Stikeman Elliott LLP in Calgary: "The bigger firms that have Aboriginal experience in all their offices are going to have a marketing tool a lot of other firms won't have." Not just because of LNG, he says, but from conventional oil as well or any "linear development that crosses traditional Aboriginal lands."

ENVIRONMENTAL LAW

British Columbia was the crucible for radical direct-action environmentalism in the late '60s, the place where Greenpeace was spawned in 1971. British Columbians are frequently more vocal than Canadians in other provinces when they think resource development threatens forests, lakes, rivers and communities. And when it comes to environmental laws, suggests Carpenter, "the BC regime is different and isn't generally familiar to most Alberta lawyers."

Enbridge Inc., mired in controversy over its proposed Northern Gateway Project, a 1,177-kilometre twin pipeline that would carry bitumen from Bruderheim, Alberta, to a new marine terminal at Kitimat, BC, is learning how different BC is. Over the decades, Enbridge, Lawson Lundell's Sanderson points out, laid tens of thousands of

kilometres of pipeline in North America relatively unopposed. "And yet," he says, "[Northern Gateway] is raising issues in a way that are entirely distinct. It's become a national political issue. And that just reinforces that BC is a distinct place that you are well-advised to think about before you enter. It's important to have a localized knowledge with respect to those issues."

So navigating environmental regulations for LNG clients is another facet of energy law where Sanderson is seeing increased activity for BC firms or the Vancouver branches of national firms. At the same time, lawyers who spoke with *Lexpert* agree with Sanderson's view that, compared to other fossil-fuel related energy projects winding through BC's environmental assessment process, LNG will get "an easier ride."

One reason is that no lawyer *Lexpert* contacted expects that BC's fracking regulations will change significantly or that fracking in BC, so vital to natural gas production now, will ever face the kind of moratorium now in Quebec, or the complete regulatory overhaul currently happening in New Brunswick. "Hydraulic fracturing procedures have taken place over the past 40 years and western Canada's regulators have considerable experience with such procedures," says Janice Buckingham at Osler in Calgary. "In BC, the *Oil and Gas Activities Act* contains multiple provisions that address the issue of fracking to protect freshwater resources."

Those rules include special permits required when fracking at depths of less than 600 metres, and prohibitions over using toxic drill fluids unless qualified engineers or geologists determine porous rock layers containing freshwater are isolated from drilling fluids. British Columbia, points out Buckingham, also now requires drillers to disclose the ingredients in frack fluids through a public registry, www.fracfocus.ca. (Alberta's ERCB is expected to roll out rules requiring frack-fluid disclosure by the end of the year.)

As long as the BC gas industry is "up-front and transparent about what it's doing and what the nature of fracking is in BC," says Chris Sanderson, "fracking will not be seen ultimately as a major issue, and natural gas will be seen as an attractive industry in a way that oil sands production is not."

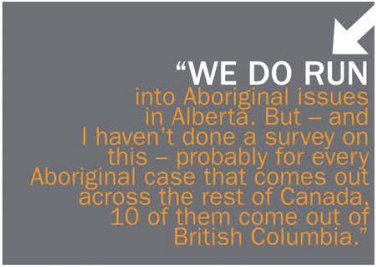
Another reason LNG may get that "easier ride" through environmental assessments is the physical nature of gas itself. If a pipeline transporting natural gas leaks, it dissipates into the atmosphere. Sure, a gas pipeline (or worse, an LNG plant) might blow up with catastrophic, even deadly results. But the effects on the environment are temporary compared to the long-term, hard-to-clean damage even a modest spill of the bitumen/condensate mixture Northern Gateway will carry.

"It's the difference in the risk that have made LNG projects more attractive, for example, for the Haisla in BC," says Holgate, who rejoined Stikeman Elliott in 2012 after a four-year absence. "I think the position they have taken is, if it blows up it's a catastrophe and it's over. If it's an oil pipeline like Gateway, and it's a huge spill, it can take years to remediate."

Pat Maguire, co-leader of Calgary-based Bennett Jones' energy practice group, agrees. "It's fair to say that the LNG projects are going to have less political and community risks than an oil project would." But that's not just because gas is perceived as less hazardous to the environment. It's also, explains Maguire, because "a lot of this gas is sourced in BC, so the royalties will be going to British Columbia economy."

Premier Christy Clark, at the Council of the Federation meeting in Halifax last July, garnered more popular support for LNG when she threatened to block Northern Gateway unless Alberta ponies up some oil royalties for BC to compensate it for facing the bulk of the environmental risks associated with that pipeline.

Compare that to the political support afforded the 463-kilometre Pacific Trail Pipeline, operated by Pacific Northern Gas. This pipeline will carry natural gas to the Kitimat LNG facility from a pipeline hub at Summit Lake, BC. In its case, the BC government supported industry in negotiating an overall accommodation agreement with affected First Nations. That included giving those bands – already



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granted an equity stake in the pipeline – a total of \$30 million in capital to buy a further stake if they wished.

"Not only the Haisla nation, but every nation along the pipeline route has approved the project," says Alan Donovan, who negotiated on behalf of the Haisla. His 10-lawyer firm continues to work with the band in relation to negotiations surrounding construction of the Kitimat LNG plant itself. "It's definitely been something we've had to dedicate a lot of people to," because of the scope of the project, he says.

But his firm couldn't do it all. When it came to commercially oriented matters, including the land lease negotiations, his firm teamed with Blake, Cassels & Graydon LLP.

This proves a point for Ron Stuber, Vancouver-based national co-lead of Fraser Milner Casgrain's (FMC) renewable energy team: when it comes to these massive LNG projects, oil and gas clients will be farming work out to a multitude of firms in both Alberta and BC. "It would be difficult for a law firm to leverage [work] completely off its environmental or Aboriginal expertise to advise on the entirety of a project," he says.

A REGULATORY GIDDY-UP

In July, under the auspices of Bill C-38, the federal government passed the new *Canadian Environmental Assessment Act, 2012* (CEAA 2012), replacing 20-year-old legislation. The CEAA 2012 alters when environmental assessments are required and, to the chagrin of many environmental organizations, speeds up the assessment process of resource projects, with specific deadlines: 24 months for those with review panels, 18

months for National Energy Board (NEB) reviews and one year for standard assessments. The new act also reduces the number of projects that require review panels and restricts public participation to “interested parties” directly affected by projects.

Companies such as Apache Canada see the changes as positive for the development of Canada’s LNG industry. For one thing, the changes bump out the federal government’s involvement in reviews to a nar-

“But we’ll do it in a shorter period of time.” Holgate does see LNG significantly changing the market for legal talent, though. “Anyone who has upstream experience with getting wells drilled, getting pipelines built, working with regulations and fracking — that’s obviously a skill set that’s going to be much in demand.”

SHIPSHAPE

Oil, says FMC’s Ron Stuber, is a much different commodity, commercially speaking, than natural gas. Before they are even built, LNG projects rely on long-term marketing contracts with buyers. On the other hand, says Stuber, oil-related projects don’t. “Oil is a world-traded commodity. The key is getting the oil to port. And as long as you have access to a tanker, it can be sold to anyone on the world market. Whereas gas is a bit more difficult to transport.”

He likens those hulking LNG tankers — looking like gigantic golf balls are embedded in their decks — to floating pipelines. Those tankers, generally following fixed routes to markets, are quite limited in number. Contracting them for LNG transport, says Stuber, takes a specialized knowledge of marine and international law that is in short supply in Canada.

Looking at the BC legal landscape, Chris Sanderson adds: “I don’t know of anybody locally who has a deep expertise in shipping contracts for natural gas or oil.” He includes his own firm, Lawson Lundell, in that assessment, and says, when it comes to contracting LNG shipments, “BC businesses have a steep learning curve” ahead.

On the other hand, Sanderson continues, Texas law firms have “a very deep knowledge because they have been shipping oil and natural gas off the Gulf Coast” for decades. And it may well be that Texas firms, along with UK firms involved in LNG projects in countries such as Qatar, Australia and Malaysia, will edge out most Canadian firms for that work — save those

few firms that have lawyers with appropriate experience.

Fasken Martineau, for instance, has lawyers in its London, England, office with solid experience in LNG shipping contracting. But Fasken Martineau’s Carpenter surmises that legal work in shipping contracts won’t change much for external firms, either in Canada or elsewhere, should a BC LNG export industry become reality this decade. “The Shells of the world have LNG ships travelling the world every day. So does Petronas. So do others.” He expects much of the related legal work will be done within in-house counsel.

Still, it’s not all bad news for Canadian legal firms on that front, suggests Bennett Jones’ Pat Maguire. Maguire’s firm has so far worked on two LNG Projects. One is Kitimat LNG. Another client is Mitsubishi Corp., which announced in May a partnership with Shell Canada, Korea Gas Corp. and PetroChina Company Ltd. on a proposal for “Canada LNG,” an export facility near Kitimat. “Even where a UK or US firm is used or in-house counsel is used in LNG sales, [Bennett Jones] has been providing local advice and insuring that the Canadian agreements align with international ones.”

In light of Bennett Jones’ experience, spillover work from shipping deals is still possible for Canadian law firms.

FINANCING AND FOREIGNERS

Cam Proctor has good reason to believe foreign investment will drive development of much of western Canada’s LNG export capability. The Calgary-based intermediate oil and gas company he worked for, Daylight Energy, was acquired for \$2.2 billion by state-owned China Petrochemical Corp. in the largest takeover to date by China of a Canadian company. Proctor is now Chief Legal Officer of the renamed acquisition, Sinopec Daylight Energy Ltd.

In the past five years, according to Bloomberg, Chinese companies alone purchased some \$30 billion of Canadian oil and gas to meet their insatiable energy demand. Other Asian countries or companies — including Malaysia’s Petronas, which bought Progress Energy for \$5.5 billion last June and plans its own LNG export facility — made significant acquisitions in BC’s gas patch. That trend certainly seems likely

THE BC GOVERNMENT IS LOOKING ACROSS THE PACIFIC TO POWER-HUNGRY ASIA FOR NEW MARKETS.



rower range of projects. As well, says Osler’s Janice Buckingham, the export licences LNG producers will need before they can ship Canadian gas to foreign markets will be granted more quickly. Those hearings will be limited to examining whether proposed exports will exceed domestic needs for natural gas.

The changes, while encouraging more gas producers to invest in Canadian oil and gas projects (thus generating more legal work) may reduce the number of billable hours firms can charge clients for environmental work. “I expect there will not be the same number of review panels struck as there have been in the past,” predicts Fasken Martineau’s Carpenter. In the case of some LNG-related projects, written assessments may suffice instead of full-blown review panels with public hearings. Where reviews aren’t required, there might be 25 per cent less legal work for law firms, Carpenter estimates.

David Holgate, however, doesn’t expect noticeable changes in the amount of work.

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to continue.

"The LNG equation requires long-term off-take agreements in place in order to support the project economics," Proctor told *Lexpert* via email. LNG projects are particularly capital intensive, he says, and will require large influxes of investment from outside the country. "It's no secret where the logical buyers are located and who, at this time, has the lowest cost of capital and who can afford to take a longer-term view of investing in natural gas." It's Asia, says Proctor.

When it comes to the complex warren of commercial legal work — financing, procurement, long-term sales contracts, joint ventures, mergers and acquisitions, Proctor says, "Many of the large global players who are involved in or looking at LNG in Canada already have internal expertise dealing with LNG or large-scale projects around the world. I think the preference in many cases is to utilize internal expertise and outsource to service providers when you need the horsepower."

But who will get to hitch their horses to the Asian LNG wagon? That work, it seems, will flow mostly to the Stampede City. At Bennett Jones, headquartered in Calgary, Maguire says that, even though LNG will be situated on BC's coastline and the gas is mostly pumped from its north-eastern forests, most related commercial arrangements will be done in Calgary and made under Alberta laws. "BC law and expertise is most relevant on the site issues — where your LNG plant will be physically located, the acquisition of land, and provincial and local permitting issues."

Bennett Jones has no Vancouver office and Maguire says his firm is well able to

serve clients from Calgary, where the firm was established nearly 90 years ago. But Bennett Jones, which has acted for Thai, Korean and Japanese interests in oil and gas, does have a representative office in Beijing. That "has provided us with a great window into potential Chinese investors,

and allowed us to make connections with Chinese investors," notes Maguire. "We



ALLAN DONOVAN
DONOVAN & COMPANY

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are the benefit of a great brand in Calgary and the energy space in particular. And we work hard to maintain it by frequent visits [to Asia], thinking strategically, and mostly doing really good work."

It helps that Bennett Jones has a lawyer

who has worked on Qatar's biggest LNG project and another with LNG experience in Asia. "It's part of the skill set we bring," he says, adding that those timely hires have been "a bit by design and a bit by luck."


Bennett Jones has also had Chinese- and Japanese-trained lawyers in the past few years work in their offices and join the Alberta Bar. "They help bridge those cultural differences. But so much of what those clients want us to do is assist them in navigating the local waters. And they want someone who understands this environment, both the legal and business environment. While they may have a different cultural perspective, they know they have to do business in a way that makes sense here."

Lawson Lundell tried opening an office in Asia in the 1980s when a large influx of Chinese businessmen moved to Vancouver, in the years before Hong Kong's repatriation to China. "That proved an expensive and not particularly attractive undertaking over time," says Chris Sanderson. "It's just very difficult to establish a presence there. So that route does not appeal."

Of course, foreign law firms also smell opportunity in BC's nascent LNG industry. "We've seen Norton Rose enter the market through its merger with Macleod Dixon," says Maguire. That union created Norton Rose Canada LLP on January 1. "Time will tell whether that will allow the old Macleod Dixon to grow in a way it might not have. The jury is out on that."

Meanwhile, Maguire is noticing one trend that bodes well for both BC and Alberta corporate lawyers. Large corporations and state-owned entities that used to drag along UK or US law firms to work with Canadian legal outfits on oil and gas deals here are, to save money, rethinking how they do things.

"I think, as we have done more and more of these types of deals, we've impressed upon these companies that the quality of lawyering in Calgary is as good as any in the world. And we are now seeing those companies eliminate the middle man, and they come directly to us for advice."

Vancouver-based firms are bound to benefit from that trend as well. Just how much they benefit, however, may depend on how this tug-of-war plays out. 

Anthony Davis is a freelance business and investigative writer based in Calgary.