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TABLE OF CONTENTS

INTRODUCTION

This edition of the energy law newsletter has stories from British Columbia and Alberta. Lawyers who authored the stories in this newsletter are Krista Hughes (in Calgary, at 403-781-9468); and Kevin Thrasher and Chelsea Wilson (in Vancouver, at 604-631-9182 and 604-631-6768, respectively). Questions regarding this newsletter ought to be directed to the editor, Jeff Christian, at 604-631-9115.

Back editions of this newsletter may be found at www.lawsonlundell.com in the Energy Law Group section.

BRITISH COLUMBIA

GHG Emission Legislation Update

Following up on the commitments Premier Gordon Campbell made at the Union of British Columbia Municipalities convention in September 2007, the *Greenhouse Gas Reduction Target Act* (GHG Act) came into effect on January 1, 2008. The GHG Act sets aggressive GHG reduction targets, aiming to decrease GHG emissions in the province to 33% below 2007 levels by 2020, and to no more than 20% of 2007 levels by 2050.

The GHG Act also mandates that the responsible minister must establish interim GHG emission targets for 2012 and 2016 and requires that those targets be in place by December 31, 2008. Beginning in 2008, the Minister must also publish reports every even numbered year describing the progress that has been made towards achieving provincial emission goals.

Public sector emissions are specifically addressed under Part 2 of the GHG Act, which requires public sector organizations (PSOs) to be carbon neutral in 2010 and every year after. Both the provincial government and its PSOs must publish a carbon neutral action report every year beginning in 2008. The reports will contain a description of specific actions implemented to minimize emissions and to achieve carbon neutrality.

The province announced that further legislation will follow in 2008 that will reach beyond the public sector and include measures to:

- establish cap-and-trade systems for significant GHG producers;
- adopt California emission standards for new vehicles;
- set low-carbon fuel standards for gasoline and diesel distributors that will require 10 per cent carbon content reduction by 2020; and
- provide legislative authority for the province to regulate landfill gas emissions.

The aggressive provincial position on GHG emissions seems certain to affect development and acquisition plans for regulated utilities such as BC Hydro. GHG emission standards will have an increased

influence in future BC Hydro Long Term Acquisition Plan filings as the utility seeks to reduce the role of GHG emitters in its facility inventory. The role of large hydrocarbon power production facilities, such as the Burrard Thermal, may ultimately be determined by yet-to-be-released, GHG emission legislation.

BCUC Accepts New BC Hydro Alcan EPA

In December 2006 the BCUC found a then new electricity purchase agreement (EPA) between BC Hydro and Alcan not to be in the public interest and therefore to be unenforceable. Following that decision, Alcan and BC Hydro undertook discussions to determine whether a new agreement acceptable to the BCUC could be developed. The parties were able to reach an agreement, and on September 5, 2007 BC Hydro filed the 2007 Electricity Purchase Agreement (2007 EPA) with the BCUC. The 2007 EPA is a long-term agreement under which Alcan will provide BC Hydro with capacity, firm and non-firm energy, and new mechanisms to take advantage of the operating synergies that exist between BC Hydro's and Alcan's hydroelectric facilities (equichange and coordination services). By order dated September 27, 2007, the BCUC established an oral public hearing into the 2007 EPA commencing November 19, 2007. On January 29, 2008, the BCUC issued its 128-page Decision. The Commission concluded that the 2007 EPA is cost-effective and in the public interest, and accepted the agreement for filing pursuant to section 71 of the *Utilities Commission Act*.

BC Hydro Phase II and III Rate Design Application Decision Issued

The BC Utilities Commission (BCUC) issued its decision on Phase II and III of BC Hydro's 2007 Rate Design Application (RDA) on December 21, 2007. Phase I of the RDA hearing dealt primarily with BC Hydro's cost of service analysis, its proposed elimination of the declining block rate structure for large commercial customers, and its proposal to amend the system extension rules regarding utility allowances. The Phase I decision was described in the Fall 2007 Energy Law Newsletter.

Phase II of the RDA proceeding dealt with rate structures in communities not integrated to the high-voltage transmissions system, and a particular complaint by the non-integrated community of Bella Bella seeking to be exempted from the inclining block rate structure generally applicable to those communities. Phase III of the RDA proceeding was to address matters relating to BC Hydro's rate structures in the non-integrated communities, specifically applicable to large commercial customers.

In its Phase II decision, the BCUC granted the specific relief sought by Bella Bella on the basis that the particular cost structure BC Hydro has in that community – a declining block electricity purchase agreement with a third party IPP supplier – was inconsistent with an inclining block rate structure. The BCUC declined however to make more general pronouncements on rate structures for non-integrated communities, in light of BC Hydro's proposal to address them in a later application to the BCUC in 2008.

In Phase III of the RDA proceeding BC Hydro applied for BCUC approval of the elimination of the tariff provisions that provided for large commercial customers in non integrated communities to pay rates that are meant to recover the full cost of service (i.e. no subsidy from integrated customers). These provisions were originally designed to protect ratepayers from a once-anticipated influx of large electricity users into non integrated areas. The BCUC accepted that in light of current circumstances the elimination of those provisions was warranted.

ALBERTA

New Provincial Energy Regulatory Framework Established

As of January 1, 2008, Alberta's former energy regulator the Alberta Energy and Utilities Board (AEUB) has been separated into two regulatory bodies, the Alberta Utilities Commission (AUC) and the Energy Resources Conservation Board (ERCB). The AUC is now responsible for the approval and ongoing supervision

of transmission lines, power plants, and gas utility pipelines, as well as the economic regulation and establishment of rates for gas, electricity and water. Additional new responsibilities for the AUC include the development and issuance of rules related to the operation of the retail electric and natural gas markets, as well as oversight over the Alberta Electric System Operator's (AESO) rule-making process. The ERCB has assumed responsibility for the safe and efficient development of Alberta's oil, gas, oil sands and coalbed methane resources in the public interest. Those proceedings, for which a notice of hearing was issued before December 31, 2007, will be processed in accordance with the previous legislative regime.

The new regulatory regime also introduced significant amendments to certain existing provincial energy legislation, amending some 31 acts and related regulations. Major amendments include the following:

Enhanced role for Alberta Market Surveillance Administrator (MSA): The MSA's jurisdiction has been expanded to include surveillance, investigation and enforcement of natural gas market activities; compliance with Commission decisions, orders and rules; and "any other matter relating to the structure and performance of the electricity and natural gas markets." The MSA has also been granted, among other things, expanded investigation powers and new authority to issue notice of specified penalties in respect of a contravention of certain ISO rules.

Proof of public convenience and need for transmission lines no longer required: When the AUC is considering an application for a permit to construct or extend/alter a transmission line, consideration of whether the proposed line is and will be required for the future public convenience and need is no longer necessary. Limitations have also been relaxed on the amount of work permissible in relation to a transmission line absent a permit.

Changed Independent System Operator (ISO) responsibilities: While the ISO retains responsibility for creating the rules for participation in the electric market, such rules must be filed with the Commission before they may be implemented. Market participants are entitled to object to ISO rules, but only on certain prescribed bases, and now carry the onus of proving the rule's deficiency. System planning criteria have also been changed directing the ISO to plan system capability in accordance with provincial needs rather than the needs of market participants.

New transmission siting considerations: The ISO is now required to consider geographic separation (meaning the physical separation of transmission lines to the extent necessary to ensure system reliability) when preparing plans and making arrangements for new facilities or upgrades to existing facilities. Considerations must include wires solutions that reduce or mitigate the right of way, corridor or other route required; and maximization of the efficient use of rights of way, corridors or other routes that already contain or provide for utility or energy infrastructure, whether such considerations result in added costs or not.

Increased administrative penalties and offence penalties: The maximum administrative penalties have increased tenfold, and prescribed limitation periods have been established. Offence provisions have also become more punitive.

Expanded Electric Utilities Act reach: The definition of "market participant" has been expanded to include brokers, brokerages and forward exchanges that trade or facilitate trading of electricity, electric energy, electricity services or ancillary services.

Alberta Court of Appeal to Review Coalbed Methane Ownership on Split Title Lands

The Alberta Court of Appeal recently granted EnCana Corporation (EnCana) and Carbon Development Partnership's (Carbon) applications for leave to appeal AEUB Decision 2007-024 in which the Board determined that, in the context of certain specific leases, the natural

gas owner and not the coal owner holds the rights to develop coalbed methane (CBM). EnCana and Carbon asserted ownership in CBM in relation to certain lands by virtue of their rights to coal. In denying relief to EnCana and Carbon, the AEUB concluded that CBM is not an intrinsic component of coal but rather a form of gas stored in and produced from coal that is gaseous and distinct from the coal at initial *in situ* conditions. The Court of Appeal further concluded that while ultimate authority on ownership belongs to the Alberta courts, the AEUB had jurisdiction to decide ownership and proprietary disputes in order to carry out its duties of determining whether to issue well licences and approvals. EnCana and Carbon requested leave to appeal the decision to the Alberta Court of Appeal. In *Carbon Development Partnership v. Alberta (Energy and Utilities Board)*, 2007 ABCA 343, issued November 6, 2007, the Court granted EnCana and Carbon's applications, emphasizing that the issue of who has the right to develop CBM on split title lands is of great importance to the energy industry, and is a matter not yet considered by a Canadian court. The appeal is expected to proceed later this spring.

Alberta Court of Queen's Bench Confirms MSA Investigation Powers and Market Participant Cooperation Duties

The Alberta Court of Queen's Bench recently issued an important ruling regarding the powers of the MSA to inquire into market participant activities and require the cooperation of market participants during an investigation. As previously reported in our newsletters, the MSA sought to require various Enmax Energy Corporation (Enmax) employees to respond to certain information requests regarding an MSA investigation into questionable importing activity that occurred in late 2005. In a decision issued last July, the Court confirmed that the MSA was entitled to seek the Court's assistance to compel answers to reasonable questions from market participant employees. In a follow-up decision issued January 24, 2008 (*Alberta (Market Surveillance Administrator) v. Enmax Energy Corporation*, 2008 ABQB 54) the Court addressed the reasonableness of the specific questions posed by the MSA during the course of its investigation into Enmax's conduct. Emphasizing the extremely broad mandate of the MSA, the Court concluded that market participants and/or their employees have little or no expectation of privacy insofar as their activities as market participants are being investigated. Given the considerable expertise of the MSA, the Court declared that it will generally be slow to second guess the MSA's views on what is important or relevant to its mandate, stating that once the Court is satisfied that an inquiry is reasonable and that there are reasonable and probable grounds to believe that access to premises and/or employees is necessary for the MSA to carry out its investigation, the threshold of what questions are reasonable in the context of the investigation is low. In the end the Court directed that answers be given to all of the questions posed by the MSA to which an initial objection had not been raised.

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Feature Article
Mackenzie Gas Project: Federal Court of Appeal Dismisses Appeal in Dene Tha' Case

The Federal Court of Appeal released its decision in the Federal Government's appeal of *Dene Tha First Nation* v. *Canada (Minister of Environment)* on January 17, 2008. The appeal stems from the October 2006 judgment of Phelan J. in the Federal Court Trial Division, who found that the Crown owed a duty to the Dene Tha' to consult on the process for the regulatory review of the Mackenzie Gas Project (MGP) and that, furthermore, that duty had been breached.

The first part of the Crown's appeal related to a request for a stay of the Federal Court proceedings. The second was the Crown's challenge to the Phelan J's finding relating to a judicial review on the basis of a breach of duty to consult the Dene Tha'. The Court of Appeal upheld the lower court's findings and dismissed both aspects of the Crown's challenge.

In the first matter, the Court of Appeal found that trial court's decision refusing the stay was discretionary and that there were no grounds to intervene in that finding.

As for the second issue, although the reviewing court did not overturn Phelan J.'s ruling, the court emphasized that the case established no new principle as to determining when the duty to consult arises nor as to the content of the duty. The Court of Appeal found that there was no error of law or overriding factual error in Phelan J.'s reasons for judgment. The Court of Appeal went on to say that the trial court's decision was entirely fact specific, and, "….it was open to Justice Phelan to find as a fact that, given the unique importance of the Mackenzie Gas Project (MGP), and in particular environmental and regulatory process under which the application for approval of the Mackenzie Gas Pipeline would be considered by the Joint Review Panel and the National Energy Board, the process itself had a potential impact on the rights of the Dene Tha'."

Some of the unique facts of this case that contributed to Phelan J.'s determination with regard to the duty to consult, are worth noting. The MGP proponents and the government representatives and regulators had engaged other First Nations in developing the regulatory framework for the project. Once the trial court had decided that the Dene Tha' should have been included among the First Nations that were consulted, the mould had been cast and court had to find that the duty to consult had been breached. The Court of Appeal's decision did not crystallize a time when a duty to consult is triggered nor did the court itemize the factors to be included in a duty to consult.

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