



TABLE OF CONTENTS

Introduction	1
Regional	1
Alberta	2
British Columbia	3
Northwest Territories	4
Feature Article	5

INTRODUCTION

The energy sector continues to be extraordinarily active in Western and Northern Canada, with a groundswell of government interest in GHG emission issues coming to the fore. Read about recent GHG developments at the federal and Alberta level in our feature article on the topic in this edition of Lawson Lundell LLP's Energy Law Newsletter.

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

REGIONAL

Imperial Oil Files New Cost Estimate for the Mackenzie Gas Project

On March 12, 2007, Imperial Oil Resource Ventures Ltd. (Imperial) filed an updated cost estimate for the Mackenzie Gas Project with the National Energy Board (NEB) and the project's Joint Review Panel. The new cost estimate for the proposed project is \$16.2 billion, a very significant increase from the previous cost estimate of \$7.5 billion. The updated information includes project costs of \$7.8 billion for the Mackenzie Valley Pipeline, \$3.5 billion for the gas

gathering system, and \$4.9 billion for the development of the three anchor fields. In addition, Imperial has indicated that in the face of the increased cost estimates it has reconfigured aspects of the project, and will file an updated project design in May with the NEB. This filing seems likely to delay completion of the evidentiary phase of the NEB and Joint Review Panel proceedings until at least late summer.

Imperial also filed a revised schedule for the Mackenzie Gas Project. According to the company's filing, construction would begin in the summer of 2010, and production start-up will begin no sooner than 2014.

NEB Approves Montana-Alberta Transmission Interconnection

On April 4, 2007, the NEB approved Montana Alberta Tie Ltd.'s (MATL) application for a permit to construct the Canadian portion of a 230kV merchant transmission line between Lethbridge, Alberta and Great Falls, Montana. Although the NEB acknowledged that when the line is integrated with the 500kV Alberta/British Columbia tie line there are certain system conditions that may impact total Alberta imports and exports, overall it was satisfied that the construction and operation of the line would not have any unacceptable effects on power systems in other provinces. The NEB's approval is subject to a number of conditions, including filing of the Western Electricity Coordinating Council (WECC) path rating report that shows whether the power line will significantly impact the power transfer capabilities between Alberta

and other jurisdictions. MATL is further required to prepare a mitigation plan for any outstanding concerns or issues arising from the WECC report. Despite the NEB's conclusions regarding effects on the Alberta transmission system, the Alberta Energy and Utilities Board (AEUB) will be conducting its own review of the project this summer.

ALBERTA

AEUB Confirms Coalbed Methane Ownership on Split Title Lands

On March 28, 2007, the AEUB issued Decision 2007-024 in which it confirmed that coalbed methane (CBM) generally belongs to the owner of gas rights on freehold mineral lands in Alberta. As previously reported in our newsletter, the issue of CBM ownership, frequently disputed between coal rights holders and holders of natural gas rights, has been the subject of numerous review applications to the Board. In denying relief to various coal rights holders asserting ownership in CBM by virtue of their rights to coal, the Board made several technical findings, including the determination that CBM is not an intrinsic component of coal, and that CBM is a form of gas stored in and produced from coal that is gaseous and distinct from the coal at initial in situ conditions. The AEUB also carefully reviewed its jurisdiction to consider the issues raised and concluded that while ultimate authority on ownership belongs to the Alberta courts, the AEUB has jurisdiction to decide ownership and proprietary disputes

for the purpose of carrying out its duties of determining whether to issue a well licence or approval. With the issuance of the decision, the AEUB will proceed with processing the applications in which legal entitlement to CBM is at issue that were held in abeyance in anticipation of the decision.

Security Concerns Further Delay Hearing into 500kV Transmission Line

The AEUB public hearing into AltaLink Management Ltd.'s (AltaLink) facilities application for approval to construct the 500kV transmission line required to reinforce Alberta's north-south transmission system has been delayed for a third time. While the first two adjournments were at the request of intervenors seeking additional time to prepare, the April 18, 2007 adjournment was the result of incidents in which people at the hearing and board staff were physically confronted or threatened with violence. As previously reported in our newsletters, the AEUB approved the West Corridor selected by the Alberta Electric System Operator (AESO) for siting the controversial 500kV transmission line last winter. There remains significant landowner opposition to the proposed routing for the line. In response to continued concerns over safety and security, the AEUB has converted the hearing to a primarily written process, with procedurally limited rights of oral cross-examination in a local court house. Only those parties actively participating in scheduled cross

examination will be allowed in the courtroom, while observers, parties waiting to participate in scheduled cross examination and other interested parties wishing to watch the cross examination must do so via live video feed at the local community centre. The written hearing process is now expected to conclude by the end of June.

Alberta Government Plans to Split Provincial Energy Regulator

Seeking to improve efficiency in the regulation of the Province's energy resources, the Alberta Conservative Government caucus has agreed to a plan to split the AEUB back into its constituent agencies, the Energy Resources Conservation Board (ERCB) and a public utilities regulator. Reversing the initial "forced marriage" implemented in 1995, the move will restore Alberta's two energy watchdogs to their former stature as separate agencies responsible for consumer protection and supply development. Announced on April 13, 2007, the revived ERCB is to concentrate on "keeping oil, gas and coal development orderly, safe and environmentally acceptable", and the separate Alberta Utilities Commission will "take over, strengthen and simplify supervision of power deregulation, consumer price protection and the electricity transmission grid". It is anticipated that the new Alberta Utilities Commission will absorb some of the functions of the AESO, the Market Surveillance Administrator, the Balancing Pool and the Utilities Consumer Advocate. It is also



reported that the government is planning to create an Office of the Ratepayer Advocate. Presumably this will create a more formal structure than the existing Utilities Consumer Advocate to actively represent the interests of small business, rural and residential customers and participate in rate setting and revenue requirement hearings. The current schedule calls for introduction of the legislation to carry out the split this spring, followed by a six-month review and transition period. The new structure is expected to be in place by January 2008.

BRITISH COLUMBIA

Court of Appeal Upholds BCUC Approval of BCTC's Vancouver Island Transmission Reinforcement Project

On April 13, 2007, the BC Court of Appeal rendered a decision upholding the BCUC's 2006 approval of BCTC's Vancouver Island Transmission Reinforcement Project.

The appeal was brought by the Tsawwassen Residents Against Higher Voltage Overhead Lines Society and the Island Residents Against High Voltage Overhead Lines. There were two issues on appeal. The first issue was whether the existing right-of-way agreements permitted the construction of the new overhead transmission lines in Tsawwassen. The second issue was whether the BCUC had erred in not finding that the "precautionary principle" was a mandatory rule of construction in the interpretation and application of the relevant provisions of the *Utilities Commission Act*. The "precautionary

principle", while not precisely defined in Canadian jurisprudence, can be understood as preventing a lack of scientific certainty regarding threats of environmental degradation from being a reason for postponing preventative measures. It was raised by the appellants at the BCUC in the context of incremental electro magnetic field (EMF) radiation arising from new transmission lines, and the effects of EMF radiation on human health.

The Court dismissed the appeal on both grounds. The Court concluded that it did not have jurisdiction to hear the first issue. As for the second issue, the Court declined to declare, in the context of this appeal, that the precautionary principle was a mandatory rule of construction. The only remaining question was whether the BCUC had come to a "patently unreasonable" decision on the basis that it had erred in not applying the precautionary principle. That question, the Court held, could not be engaged because the BCUC's findings of fact had not properly been put in issue on the appeal and in any event were not subject to review by the Court. A copy of the Court's decision can be found at <http://www.courts.gov.bc.ca/jdb-txt/ca/07/02/2007bcc0211.htm>

BCUC Approves BC Hydro's Long-Term Resource Plans

On March 15, 2007, the BCUC issued an approval order regarding BC Hydro's 2006 Integrated Electricity Plan (IEP) and Long-Term Acquisition Plan (LTAP). The IEP is a long-term plan that describes how BC Hydro could meet customers'

electricity needs over a 20-year planning horizon and the resource options available to meet those needs under a variety of assumptions. The LTAP is a short to medium term action plan that is supported by the 2006 IEP. It itemizes the actions BC Hydro intends to take in the next ten years to meet customers' electricity needs as part of BC Hydro's overall planning and resource acquisition process.

After a year long hearing process, the BCUC determined that the following expenditures were in the interests of persons within BC who receive or may receive service from BC Hydro:

- \$1.7 million to undertake preliminary work on the next generation of BC Hydro's demand side management programs, including completion of an updated Conservation Potential Review;
- \$0.8 million for a micro hydro load displacement project with the Greater Vancouver Water District;
- \$2.9 million to undertake BC Hydro's next call for energy;
- \$0.5 million to undertake preliminary work for a further call for energy in 2009;
- a total of \$12.5 million to complete the design work on the Revelstoke Unit 5 project; and
- a total of \$3 million to complete the preliminary work for the next Revelstoke or Mica unit.



Full written reasons for the Commission's decision are expected in the near future.

Update on Alcan Electricity Sale Agreements

As noted in our Winter 2007 Newsletter, on December 29, 2006 the BCUC declared Alcan's energy sale agreements with BC Hydro to be not in the public interest and wholly unenforceable. Earlier this year, each of BC Hydro, Alcan and the Province filed notices of appeal with the Court of Appeal. Those appeals have now all been abandoned. Alcan and BC Hydro have indicated that they have undertaken discussions to see if a new agreement acceptable to the BCUC can be developed.

On a related note, the BC Supreme Court has dismissed a petition by the District of Kitimat claiming that Alcan's decision to restrict its production at its aluminum smelter at Kitimat while at the same time selling hydro power was contrary to the legislation and the agreement made between Alcan and the Province in 1950. Chief Justice Brenner concluded that there were no restrictions on Alcan's use or sale of Kemano power in the legislation or agreements with the Province. The District is seeking to appeal this Supreme Court decision.

Upcoming Amendments to BC's Oil and Gas Legislation

On March 7, 2007, The BC Legislature gave first reading to Bill 12, which contains amendments to the *Petroleum and Natural Gas Act*. The proposed amendments will allow initial lease-holders of underground oil and gas rights to retain only the rights within

any zone or zones in which oil or gas is found, but not the rights to any other zones. Shallower and deeper zones will be made available for others to explore and develop. This change will not affect existing leases.

NORTHWEST TERRITORIES

Call for Bids for Petroleum Exploration in Beaufort Sea/Mackenzie Delta

Canada's Minister of Indian Affairs and Northern Development has recently issued a call for bids for petroleum exploration rights on three parcels in the Beaufort Sea/Mackenzie Delta region of Northern Canada. The parcels total 417,217 hectares, and are situated offshore the Central Beaufort Sea (Parcel BS 1); offshore the Northeastern Mackenzie Delta (Parcel BS 2); and in the Western Beaufort Sea (Parcel BS 3). The deadline for the call for bids is July 17, 2007 at noon.

The term of the exploration licences will be nine years, consisting of two consecutive periods of five and four years. The drilling of a well during the first period of the licence is a condition for entering the second period. For further information regarding the oil and gas licensing process, please see "A Regulatory Roadmap: Successfully Navigating Oil and Gas Licensing Regimes in the North", a paper authored by Lawson Lundell LLP lawyers Keith Bergner and Mariana Storoni and recently presented to the Canadian Institute's Oil and Gas Summit in Calgary. A copy of the paper may be found at <http://www.lawsonlundell.com/resources/Oil.Gas.Licensing.Regimes.North.2007.pdf>.

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FEATURE ARTICLE: NEW FEDERAL AND ALBERTA CLIMATE CHANGE INITIATIVES

Recently, both the federal government and Alberta have announced significant initiatives relating to the regulation of greenhouse gases. The following provides a brief summary of each initiative. On March 5, 2007, our Energy Law Practice Group circulated a description of BC's new "Green" energy plan, which is available on our website at:

<http://www.lawsonlundell.com/aop/EnergyLaw.asp>.

Federal Government Releases New Climate Change Plan

On April 26, 2007, the Honourable John Baird, Minister of the Environment, announced the federal government's climate change plan entitled "Turning the Corner: An Action Plan to Reduce Greenhouse Gases and Air Pollution". As set out in the plan, the federal government has committed to reducing Canada's total emissions of greenhouse gases, relative to 2006 levels, by 20% by 2020 and by 60% to 70% by 2050. Under the 1997 Kyoto Protocol, Canada committed to a 6% cut in greenhouse emissions from 1990 levels by 2012. Minister Baird indicated that despite the mandatory reduction targets set out in the Turning the Corner plan, Canada will not meet its Kyoto deadline.

To the consternation of environmentalists, the current approach focuses on intensity-based reductions, rather than absolute reductions of greenhouse gas emissions. Emissions intensity represents the quantity of specified gases released by a facility per unit of production from that facility.

In addition to measures related to greenhouse gas emissions, the plan also addresses air pollutants generally. For air pollutants, the framework anticipates fixed emission caps that will enter into force between 2012 and 2015. Other components of the plan include the development of a mandatory fuel efficiency standard for motor vehicles and phasing-out of the use of incandescent light bulbs by 2012.

The proposed new regulatory requirements will impact facilities in many industrial sectors, including thermal electricity generation; oil and gas; forest product production; smelting and refining; iron ore pelletizing; and cement, lime and chemicals production.



Industrial Emissions of Greenhouse Gases

Key components of the plan include:

- ▶ existing facilities will be required to comply with emission-intensity reduction targets for each sector that will come into force in 2010, based on an improvement of 6% each year from 2007 to 2010 (resulting in an enforceable reduction of 18% from 2006 industrial emission-intensity levels by 2010);
- ▶ from 2011 onwards, existing facilities will be required to comply with a 2% continuous emission-intensity annual improvement; and
- ▶ new facilities (defined as those whose first year of operation is 2004 or later) will have a three-year grace period in order to allow the facilities to reach full production and to establish their initial emissions levels. Thereafter, they will be subject to 2% annual emission-intensity reduction targets through 2020.

Under the plan, firms will have several options to meet their emission-intensity reduction targets, including:

- ▶ reducing emissions through abatement actions;
- ▶ contributions to a technology fund, designed to act as a means of promoting the development, deployment, and diffusion of technologies that reduce emissions of greenhouse gases across industry;
- ▶ participation in emissions trading, including inter-firm trading. Firms that have emission intensities lower than their targets will receive credits which may be sold or banked for future use;
- ▶ purchase of offsets from non-regulated activities (e.g. emissions from agriculture);
- ▶ use of qualified credits from the Kyoto Protocol's Clean Development Mechanism; and
- ▶ use of a one-time recognition of early action for firms that took verifiable action between 1992 and 2006 to reduce their greenhouse gas emissions (credits for early action will represent a maximum reduction of 15 megatonnes of carbon dioxide across industry and precise eligibility criteria have not yet been developed).

Air Pollution Emissions

It is proposed that national emission caps will be set for each pollutant of concern, being nitrogen oxides (NO_x); sulphur oxides (SO_x); volatile organic compounds (VOCs), and particulate matter (PM). Limits are also proposed to be set for other air pollutants such as mercury from electricity generation, and benzene emissions from the natural gas, iron and steel sectors. Sectoral emission caps will be set for each air pollutant of concern in a given sector. Sectoral emission caps will be set for each air pollutant of concern in a given sector. Air pollutant targets may come into force as early as 2012.



The Regulatory Framework for Air Emissions document sets out the manner in which firms may meet the new pollution emission requirements. In addition to simply reducing emissions, firms may also meet regulatory requirements through a domestic cap-and-trade emissions trading system for SO_x and NO_x only across Canada (although, if a firm is in an area where the quality of the air does not meet national air quality objectives, restrictions will be placed on that firm's use of credits from emissions trading).

The Regulatory Framework for Air Emissions document indicates that the regulatory framework for air pollutants, including the targets, compliance mechanisms and timeframe for the entry into force of the regulations, will be finalized by fall 2007. Publication of sector-specific and greenhouse gases regulations in the *Canada Gazette, Part I*, is expected in the spring of 2008. These regulations will be revised to incorporate air pollutant provisions at a later date (following normal regulatory procedures). The primary federal statute that will provide authority for the new regulations will be the *Canadian Environmental Protection Act, 1999* (CEPA). Consultations are currently underway between the federal government and provinces and territories, industry sectors and other stakeholders to discuss key elements of the regulations. Helpfully, provisions in CEPA provide for harmonization of federal and provincial regulations.

On March 3, 2007, the federal government published a notice in the *Canada Gazette, Part 1* which details the requirement that facilities who exceed the 100kt CO₂ equivalent GHG emission threshold must report their 2007 GHG emissions on or before June 1, 2008. As per the Canada Gazette notice of July 15, 2006, data for the 2006 calendar year is due no later than June 1, 2007.

Alberta Legislates Greenhouse Gas Reductions for Large Industry

On April 17, 2007 the Alberta Legislature passed legislation to reduce greenhouse gas emission intensity from large industry. The *Climate Change and Emissions Management Amendment Act* and accompanying *Specified Gas Emitters Regulation* provide that, starting 1 July 2007, companies that emit more than 100,000 tonnes of greenhouse gases a year must reduce their emissions intensity by 12 per cent.

The legislation, a portion of which came into force on April 20, 2007, outlines the options for meeting the target and details how companies can reduce emissions intensity, among other things. Compliance options include making operating improvements or purchasing Alberta-based offsets to apply against emissions totals.

Where reducing emissions intensity by 12 per cent is not initially possible, large emitters will be required to contribute to a new government fund that will invest in technology to reduce greenhouse gas emissions. Spending from the technology fund will occur in the province, to support research into innovative climate change solutions and to develop infrastructure to reduce emissions. Effective July 1, for every tonne above the 12 per cent target, large emitters will be required to pay \$15 per tonne to the technology fund.



The legislation, which is not yet fully in force, is expected to apply to about 100 facilities, representing about 70 per cent of Alberta's industrial emissions. Alberta instituted mandatory greenhouse gas reporting requirements for large industrial facilities in 2004.

In related news, the Province's Lieutenant Governor-in-Council approved Alberta's new Emissions Trading Regulation in February 2007. Enacted pursuant to environmental protection legislation, the Emissions Trading Regulation establishes a baseline and credit system (as opposed to a cap and trade system) and an Emissions Trading Registry for coal and gas-fired electricity producers (including cogeneration units). Generating unit operators with a maximum continuous rating of 25MW or more are required to establish an emissions trading account by designated deadlines. In addition to setting out a regime for emissions trading credits, the regulation also contains baseline calculations regarding certain specific substances and baseline emission rates for new generating units. While the Emissions Trading Regulation currently addresses nitrogen oxides and sulphur dioxide, it does not address carbon dioxide.

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