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Contracting by Silence

The Risky Business of Operating a Jointly Owned Oil Battery
without a Construction, Ownership and Operation Agreement

by Julie Inch

Introduction

On June 26th, 2008, the Honourable Madam Justice R.E. Nation of the Court of Queen's Bench of Alberta released her judgement in *Husky Oil Operations Limited v. Gulf Canada Resources Limited and Sabre Energy Ltd.*¹ ("Husky Oil"). This decision involved a dispute among joint owners of a facility over fees charged to process production from tied-in unequal ownership wells. Without a Construction, Ownership and Operation Agreement ("CO&O Agreement"), Justice Nation was given the task of determining what terms and conditions governed the joint ownership relationship.

Fact In Husky Oil

In 1990, the Killarney Oil Battery was constructed and commissioned for over \$3 million by the following parties: Renaissance Energy Ltd., now Husky Oil Operations Limited ("Husky"); Crestar Energy Inc., now Gulf Canada Resources Limited ("Gulf"); Sabre Energy Ltd. ("Sabre"); and, two other owners, not parties to this litigation (collectively, the "Joint Battery Owners"). At all material times to the lawsuit, Husky held 63% of the working interest ownership, Gulf held 20% and Sabre held 14%.

Joint Battery Owners attempted to negotiate a CO&O Agreement in 1990, drafts were circulated, but no CO&O was executed. In May of 1992, Husky took on the role of operator of the Killarney Oil Battery. At that time a second draft of the CO&O Agreement was circulated, but again, no agreement among the Joint Battery Owners was finalized. From May of 1992 until August of 1996, Husky, as Operator, set and charged processing fees for production from all tied-in wells and a substantially higher fee for processing of production from all trucked-in wells.



This decision involved a dispute among joint owners of a facility over fees charged to process production from tied-in unequal ownership wells.

In 1996, six (6) new wells were tied-into the Killarney Oil Battery, five (5) of which were owned 100% by Husky and one (1) of which was owned 97% by Husky (the “Husky Wells”). As the Husky Wells were not owned by the Joint Battery Owners in proportion to their working interests in the Killarney Oil Battery, in a letter dated December 6, 1996, Husky advised the Joint Battery Owners that production from the Husky Wells would be charged the same fee as production from the trucked-in wells (the “Husky Wells Fees”). None of the Joint Battery Owners responded to Husky’s letter; as a result, Husky commenced charging the Husky Wells Fees to itself and the other owners of the Husky Wells retroactive to August 24, 1996, the date the wells were tied-into the Killarney Oil Battery.

In 1999, Husky determined that the Husky Wells Fees that it was charging itself were too high and concluded that it had erred when it originally set those fees. As a result, in a letter to the Joint Battery Owners dated August 30, 1999 Husky advised that there had been a mistake in setting the fees for the Husky Wells and that the fees should have based on the Jumping Pound Formula. Husky sent a further letter to the Joint Battery Owners on June 16, 2000, setting out a recalculation of the Husky

Wells Fees that were chargeable to the owners of the Husky Wells over the period, based on the Jumping Pound Formula. Included in the letter was a request to sign and return a portion of the letter by June 30th, 2000. The letter also indicated that failure to respond would be deemed acceptance of the recalculations of the processing fees charged for the Husky Wells on both a retroactive and go-forward basis. Gulf returned and signed the consent form on the understanding that Husky had never charged any fees for the production from the Husky Wells and that all the Joint Battery Owners would be receiving a credit. Sabre on the other hand, had difficulty reconciling the production numbers in the June 16th, 2000 letter and contacted Husky.

On November 16th, 2000, another letter with further changes to the calculation of the Husky Wells Fees based on the Jumping Pound Formula was sent only to Sabre from Husky. This letter also requested a sign and return portion by November 24th, 2000, and stated that failure to respond would be deemed acceptance. No formal response was made by Sabre. Less than two weeks later, on November 30th, 2000, Husky sent a letter to the Joint Battery Owners stating that the method of calculating the processing fees for

the Husky Wells (as set out in the November 16th, 2000 letter) had been approved. For the first time, Gulf and Sabre were informed that there was an invoice to be paid by them and not a credit. Invoices for the following amounts were attached: \$865,187.58 for Sabre and \$1,315,464.44 for Gulf.

Both Gulf and Sabre refused to pay the invoices and Husky initiated this lawsuit claiming unjust enrichment and sought damages in the amount of the two invoices. Husky claimed that, as owner of the Husky Wells and as a user of the Killarney Oil Battery, it had been overcharged by itself, as Operator of the Killarney Oil Battery and Gulf and Sabre, as owners of the Killarney Oil Battery, were unjustly enriched by their proportionate share of the overcharged amounts credited to them.

Justice Nation dismissed Husky's claims for unjust enrichment and based her decision on a number of factors.

Deciding Factors In *Husky Oil*

No Unjust Enrichment

In order to be successful in a claim for unjust enrichment, Husky was required to show that Gulf and Sabre had been enriched, that Husky had suffered a deprivation and that there was no legal reason why Gulf and Sabre should retain the enrichment.

The Supreme Court of Canada in *Garland v. Consumers' Gas Co.*² stated that the existence of a contract between parties justifies a legal reason not to interfere with the enrichment. Was there a contract? When does silence constitute a contract?

In finding that there was an enrichment to Gulf and Sabre, Justice Nation concluded that the processing fees charged for the Unequal Ownership Wells that Husky set as Operator were equivalent to trucked-in fees, which were, according to the witnesses called at trial, higher than the witnesses would have generally expected to pay.

With enrichment to Gulf and Sabre and a corresponding net deprivation to Husky, Justice Nation was left to determine the issue of whether or not there was a contract which in this case required an examination of circumstances where silence constitutes a contract?

The Existence of a Contract to Pay the Higher Processing Fees

Although the Joint Battery Owners had negotiated two drafts of a CO&O Agreement, Justice Nation refused to give legal effect to

either of the unexecuted CO&O Agreements, as the parties did not provide the court with evidence that either Agreement had been finalized. Instead she focused on the "unique environment" in which the parties were operating and she looked to the correspondence between the Joint Battery Owners to determine whether a contractual relationship existed.

Gulf and Sabre argued that a contract was formed in 1996 between Husky, Gulf and Sabre to charge the owners of the Husky Wells, processing fees equal to the processing fees charged for processing production from trucked-in wells.

Justice Nation concluded there was a contract, holding that in certain circumstances silence can constitute acceptance of an offer to create a contract. Justice Nation stated in her decision:

1. Silence is not usually, but in certain circumstances may be, acceptance of an offer. This very much depends on the circumstances and facts of the case, and must be in keeping with the conduct and circumstances of the parties.
2. Husky by its own admission was not looking for approval for the fees, only asking for questions or concerns. Sabre had looked at the fees and found them reasonable, and did nothing. No response was received from Gulf. Husky went ahead and implemented the fees at the end of December, little lag time if it was expecting a response or acknowledgment of agreement.
3. Husky was the operator, having complete control of the accounting. It was certainly not in the dark, or having this fee "imposed" on it in any sense. In fact, it picked the fee, whether for administrative ease, for historical reasons, or because that was an accepted rate in the area for trucked in production.
4. In the context of their business dealings, the parties were making decisions as they carried along. Husky's suggested fee was met by silence and then implemented. It could be seen in the monthly billings. This carried on for three years with no apparent concern by any of the joint battery owners. This suggests that all parties had agreed or acquiesced to the fee (at para. 53).

The finding by Justice Nation of a binding contract (albeit partially created by silence) to charge the Husky Wells a processing fee equal to the processing fee for production from the trucked-in wells resulted in the failure of Husky's claim in unjust enrichment.

The Issue of a Retroactive Change in Fees

Husky argued that if a contract to set the fees in 1996 was established, then the same reasoning would apply to dictate that the 1996 contract was subsequently amended by correspondence in 1999 and 2000 and on a retroactive basis. In other words, "if silence by the defendants to the December letter was acceptance of the fees proposed in 1996, then silence by the defendants to the August letter and by one defendant to the June and November letter was acceptance and a contract for the fees proposed in 1999 and 2000" (at para. 59).

Justice Nation found that the parties did not contract to retroactively change the fees in 1999 or 2000, as there was never a consensus among all of the Joint Battery Owners for such a contract. The correspondence involved fees agreed to by Sabre on one level and then on another level by Gulf. All of the parties would have had to agree to the terms set out in the November 30, 2000 letter for there to be a valid contract to retroactively change the fees. No such consensus existed and accordingly, Husky's argument that the Joint Battery Owners agreed to retroactively change the fees was dismissed.

Concluding Thoughts

Without a CO&O Agreement, there is no certainty as to the terms and conditions that govern a joint ownership relationship. Justice Nation's judgment in *Husky Oil* paints a picture of the hurdles joint owners can face if they operate without a formal CO&O Agreement, in particular:

1. an unsigned CO&O Agreement may not be an enforceable contract and action taken (or not taken) by an operator or joint owner of a facility in reliance on the terms of an unsigned CO&O Agreement may be open to challenge in a court of law; and
2. absent a signed CO&O Agreement that deems silence to be a "negative response", remaining silent in the face of a course of action could, in certain circumstances, result in the finding of a contract. If a joint owner disagrees with a course of action of the operator or any other joint owner, the disagreeing joint owner should notify the other owners accordingly.

Footnotes

¹2008 ABQB 390

²[2004] 1 S.C.R. 629

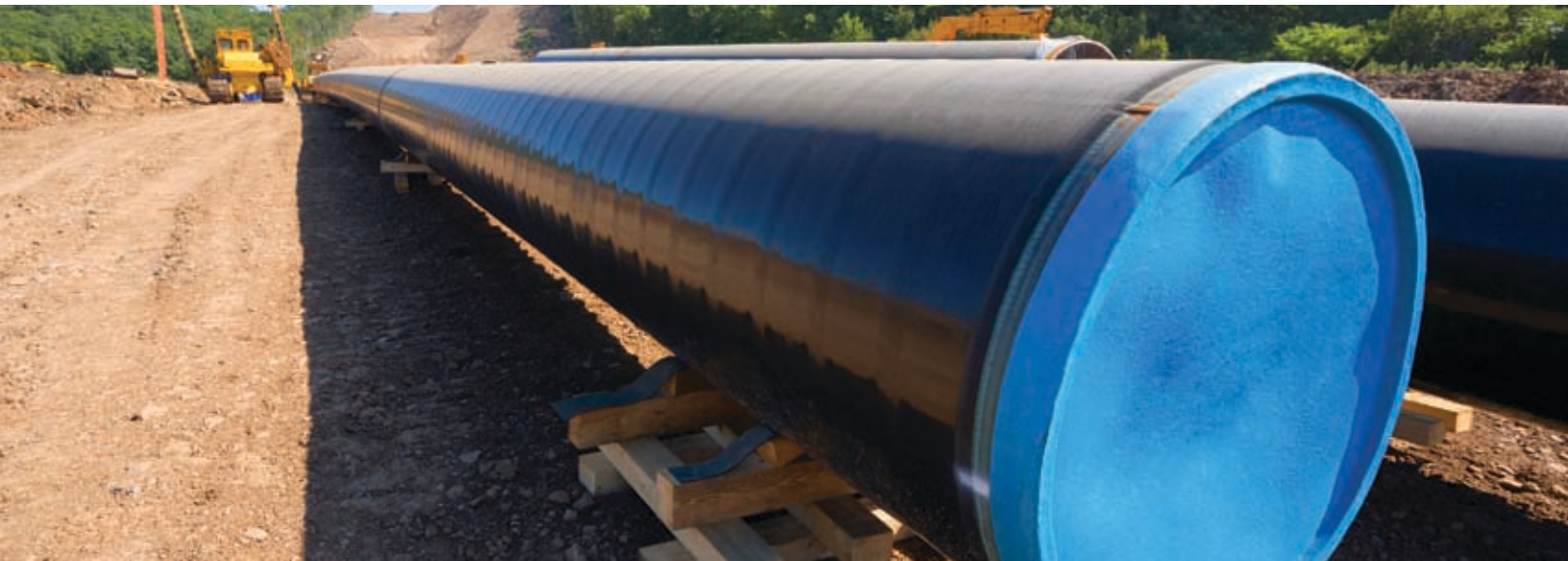
PST: Exemptions for Certain Aspects of the Oil & Gas Industry

by Lindy Shearer

Under the Social Services Tax Act the general rule is that goods and services that are purchased or consumed in British Columbia will be subject to PST, which is payable on the full purchase price at the time of the purchase. However, there are many exemptions from liability to pay the tax.

A common exemption is the Production Machinery & Equipment exemption (PM&E), which applies if one regularly engages, for commercial purposes, in the exploration, discovery or development of petroleum and natural gas deposits and the machinery or equipment is used exclusively for such activities. The term “regularly” means that the activity is undertaken on a routine basis and the term “used exclusively” means that the machinery or equipment must be used over 90% of the time it is in use in the exploration, discovery or development of petroleum and natural gas deposits.

In addition to the aforementioned exemptions, parts that are used on machinery or equipment that qualify for exemptions will also be exempt from PST. A key component of this exemption is that the part cannot be modified or be a material to make a part to fit in with the exemption. The recent case of *Teck Cominco Metals Ltd. v. British Columbia*¹ (“*Teck*”) dealt with this issue and found that the exemption could still apply if *minor* modifications to a part were made, so long as the alterations did not change the nature of the part. In *Teck*, a conveyer belt was cut into three pieces to be transported up to a mine site, and was subsequently adapted to the machine. The Court also stated that in order to be exempt from PST, the *Social Service Tax Act* did not require that a part be specifically designed for a particular machine, but only that it be used in the machine.



The transportation of the petroleum or natural gas between plants or offsite repairs likely do not qualify for PM&E and will be subject to PST. Consequently, equipment purchased in or imported into British Columbia and used regularly for this purpose will likely be subject to PST.

Another exemption is the one for Geophysical Surveying (GSE). The GSE is based upon the same qualifying criteria as the PM&E exemption in that one must regularly engage in exploration for petroleum or natural gas or the development of petroleum and must use the machinery or equipment exclusively in those pursuits. Eligible equipment and machinery include: magnetometers, gradiometers and magnetic susceptibility meters, instruments designed to measure the elements, variations and distortions or the natural gravitational force, equipment for electrical and electromagnetic surveying and instruments and equipment for seismic prospecting.

If an exemption is applicable to one’s situation, the recommended step is to provide a completed Certificate of Exemption to the supplier, listing each type of machinery or equipment that qualifies. In the alternative, a certification may be stamped on the purchase order. If PST is found to apply, the purchaser must self-assess and record the PST due in the following tax return.

Lastly, if one is eligible for either the PM&E exemption or the GSE, then PST will not be payable on services received that are related to the goods in question.

The British Columbia Ministry of Small Business and Revenue has published lists of taxable and non-taxable goods that can be helpful in determining if PST is owed (http://www.sbr.gov.bc.ca/industry_specific/oil_and_gas/oil_and_gas.htm). Further information on the exemptions is also found in the Regulations to the Social Service Tax Act, specifically Division 13 which deals with manufacturing.

Footnotes

¹2009 CarswellBC 12

Words Take on Plain Ordinary Meaning

by Hazel Saffery, Student-at Law

Introduction

It is a common industry understanding that an “Owner” under a construction, ownership and operating (“CO&O”) agreement cannot purchase third party natural gas at the wellhead and deliver it to the relevant facility for processing as “Owner’s Gas”. Be that as it may, the recent Queen’s Bench decision of *Semcams ULC v. Exxonmobil Canada Energy*¹ reminds us that if “common industry practice” is not reflected within the plain and ordinary meaning of the words used in the CO&O agreement, the words we agree to, rather than the industry practice, may govern and prevail to the extent of the inconsistency.

Facts

In *Semcams*, *Semcams ULC* (“*SemCams*”) and *ExxonMobil Canada Energy* (“*ExxonMobil*”) were joint owners of the Spotter gas gathering system and successors in interest to the Spotter CO&O agreement (the “*Spotter Agreement*”). Under the *Spotter Agreement*, each of *SemCams* and *ExxonMobil* were entitled to use their participating interest share of capacity for the transportation of natural gas from wells in which they owned interests and paid a fee for using capacity for their own production in excess of their participating share. Third parties or “non-owners” paid a transportation fee.

ManCal Energy Inc. (“*Mancal*”) was a producer that transported its gas from wells in the area as “*Outside Gas*” under the terms of the *Spotter Agreement* and paid applicable third party transportation fees. In 2006, *Semcams* purchased natural gas from *Mancal Energy Inc.* (“*Mancal*”) at the wellhead from several of these wells (the “*Mancal Gas*”) and gave notice that it would be transporting the *Mancal Gas* through the *Spotter gas gathering system* in its capacity as an owner, without the obligation to assume and pay the third party transportation fees that *Mancal* had been paying.

ExxonMobil disputed *Semcams* ability to transport *Mancal Gas* through the *Spotter gas gathering system* as an owner on the basis that the *Mancal Gas* was not produced from wells in which *Semcams* had a working interest and

accordingly, was “*outside gas*” that was subject to third party transportation fees. *ExxonMobil* suggested that *Semcams* arrangements with *Mancal* were “*mid-stream*” arrangements that were not contemplated by the *Spotter Agreement*.

Issues and the Disputed Clauses

Semcams argued that the words used in the *Spotter Agreement* clearly and unambiguously allowed *Semcams* to transport *Mancal gas* free and clear of third party transportation fees. *Exxonmobil* argued that the matter was not solely related to the construction of the written agreement and other evidence would demonstrate the intentions of the original contracting parties.

The specific clause in dispute was the following:

Each Owner shall have the right to use that percentage of the Capacity of a Lateral or Segment equal to its respective Lateral Participation or Segment Participation in that Lateral or Segment, for the transportation of its Gas. ...[Emphasis added]²

For such purposes:

- (j) “*Gas*” means Natural Gas and Outside Gas or either of them;
- (q) “*Natural Gas*” means gas, as defined in *The Oil and Gas Conservation Act (Alberta)* as amended, from wells located in the Designated Area belonging to an Owner before it has been subjected to any processing except water removal;
- (u) “*Outside Gas*” means Gas, as defined in *The Oil and Gas Conservation Act (Alberta)* as amended, which is not Natural Gas, before it has been subjected to processing except water removal; [Emphasis added]

SemCams argued that once it acquired the *Mancal Gas*, the *Mancal Gas* became “*its Gas*” for the purposes of the relevant clause.

Exxonmobil argued that it was never the intention of the Owners to permit mid-streamers to transport gas purchased at the wellhead. Its position was that this failure to adequately address this situation in the *Spotter Agreement*

was a mistake that should be rectified by applying the 1999 Petroleum Joint Venture Association Model CO & O definitions.

Justice Brooker found that there were no material facts in dispute and clarified the issue as follows (at para. 37):

The issue in this case is whether or not *Semcams* is entitled to transport gas it purchases at the wellhead, under the capacity allotted to it under the *Spotter Agreement*. The answer to that question depends on the proper interpretation of provisions of the *Spotter Agreement* and in particular, the meaning of “*its Gas*”.

Justice Brooker held that there was no ambiguity in the language of the *Spotter Agreement*, as a result, extrinsic evidence of what the original parties to the *Spotter Agreement* intended would not be considered. While Justice Brooker recognized that the *Spotter Agreement* did not specifically address mid-stream acquisitions of natural gas at the wellhead (and noted that at the time, it was not industry practice to consider them), he held that the omission was not a “*mistake*” entitling *Exxonmobil* to rectification:

There is no other agreement that reflects the “*true*” agreement reached between the parties that was erroneously or mistakenly expressed in the *Spotter Agreement* as executed.³

Justice Brooker also held that *Semcams* was a *bona fide* purchaser for value without notice of any alleged “*mistake*”. Rectification of the *Spotter Agreement* to exclude mid-streamers from transporting their gas at the wellhead would clearly prejudice *Semcams* and equity would not allow it.

Concluding Thoughts

Given the trend of the Courts to interpret the clauses of an agreement using the ordinary meaning of words, care should be taken to ensure words say what is intended by the parties.

Footnotes

¹2008 ABQB 469.

²Clause 903(a) of the *Spotter Agreement*.

³At paragraph 51 of the decision.

Climate Change 2010: IMPLICATION OF U.S. PROPOSALS on Canada's Emissions Regulations Plans

By Aaron Rogers

Introduction

The historic inauguration of U.S. President Barack Obama on January 20, 2009 has significant implications for the direction of climate change and emissions reduction regulations in both Canada and the United States.

New Energy for America

A major element of President Obama's broad New Energy for America plan is his ambitious goal to reduce greenhouse gas emissions by 80% by 2050 beginning with a reduction to 1990 levels by 2020. To reach these milestones, he has consistently indicated a preference for a cap and trade regulatory system featuring fixed caps on the emissions of regulated emitters.

Under President Obama's proposed plan¹ all emissions permits would be auctioned off to regulated entities with the proceeds of such auctions going to fund clean energy initiatives. He aims to channel \$15 billion per year from auction proceeds to fund investments in energy efficiency, biofuels and clean energy vehicles, with the remainder being used for habitat protection and rebates or other measures to ensure that vulnerable Americans are not adversely impacted as a result of climate change policies.

Although President Obama's plans have been criticized as being too ambitious given the current economic climate and too difficult to pass in Congress, he has responded that he is committed to making the cap and trade system work. He does acknowledge that he may have to be flexible in order to do so, potentially scaling back individual components of his green plan if necessary.

Canada's Regulatory Framework

Canada's proposed Regulatory Framework for Industrial Greenhouse Gas Emissions announced on March 10, 2008 (the "Regulatory Framework"), which built on the previously released Regulatory Framework for Air Emission (released in April, 2007), differs from Obama's climate change proposals in a fundamental way: it utilizes intensity targets rather than absolute caps on emissions to meet its emissions reduction targets. More than one environmental group has pointed out that intensity targets are less likely to result in the achievement of emissions reduction goals and actually permit overall emissions by regulated entities to increase.

Further, emissions reduction goals under the Regulatory Framework are 20% below 2006 levels by 2020, or approximately 625 MT of total emissions. Obama's proposals, if applied to Canada, would have a goal of 596 MT total emissions by 2020, a 5% difference that is significant given the volume of carbon dioxide it involves. Reduction commitments under Kyoto, for comparison, would have required a reduction down to 563 MT of emissions by 2012: 6% below Obama's proposals and 10% below the Regulatory Framework objective, within a shorter time frame.

Thus, the principle differences between Obama's proposals and the Regulatory Framework lie in the ultimate goals of the plans and the chosen methods of achieving those goals. The Regulatory Framework has a number of additional features that are difficult to compare to the Obama proposal given that the details of both plans are still forthcoming. Certain features of the Regulatory Framework, specifically the ability to comply with regulations by paying into a technology fund, are unlikely to be contained within a U.S. plan focussed on absolute emissions limits. Another significant difference is likely to be the auctioning of emissions permits under the proposed U.S. cap and trade plan, which is not part of the emissions intensity approach proposed by Canada.

Drafts of the regulations needed to implement the Regulatory Framework, expected to have been by the fall of 2008 and become binding on January 1, 2010, are still forthcoming. It has been widely suspected, not surprisingly, that the Canadian government is waiting to see the position of President Obama on climate change before it acts to implement any of its policies.

Federal Government Inclinations

Speculation that Canada was waiting for U.S. movement on emissions trading was largely confirmed on the day of President Obama's inauguration when Prime Minister Stephen Harper signalled a desire for common environmental standards and federal Environmental Minister Jim Prentice told a group of Toronto businessmen that a bilateral approach to energy and environmental policy was needed between the U.S. and Canada, with Canada's intention being to attempt to develop a common cap and trade system for regulating emissions². Mr. Prentice has since suggested that Canadian regulations will likely be amended to follow the U.S. regulations more closely. Further, effective January 5, 2009, Prime Minister Stephen Harper appointed Bob Hamilton, a former associate secretary of the Treasury Board, as Associate Deputy Minister of the Environment. His responsibilities are expected to include the development of a joint North America emissions trading system.

As a result, is now expected that any concrete action by Canada on climate change will be delayed indefinitely pending further development of the proposed U.S. legislation.

Relevance to Alberta

Not surprisingly, Alberta Premier Ed Stelmach has indicated that Alberta hopes to be involved in any climate change discussions between Canada's federal government and the incoming U.S. administration. A key issue for Alberta will be the treatment of oil sands production under any upcoming environmental legislation. Although the oil sands have recently been labelled as "dirty oil" by the media in response to U.S. legislation limiting the carbon content of imported fuel, Alberta's oil sands will be instrumental in accomplishing President Obama's goals of increasing energy security and reducing dependence on foreign oil.

In order to ensure that this message is received and understood by President Obama, Mr. Stelmach has recently extended an invitation to the President to visit Alberta's oil sands during his visit to Canada in mid-February. Alberta has also stressed that it will not support any climate change proposal that impairs the competitiveness of its oil and gas industry or results in the flow of capital outside provincial boundaries.

Conclusion

Despite speculation that the current economic climate will prevent President Obama from enacting his climate change proposals as quickly as desired, it is clear that Canada's proposed approach to greenhouse gas regulation will have to be revised in order to permit the establishment of a joint emissions trading policy in North America. As a result, both Canadian and American companies potentially subject to regulation will continue to operate in an environment of uncertainty with respect to the financial and operational impacts of climate change policies, at least in the near term.

Footnotes

¹ my.barackobama.com/page/content/newenergy

² "Canadian, U.S. energy policies to be inextricably linked: Prentice", *Globe and Mail* (January 20, 2009); "Harper wants joint Canada-U.S. policies on energy, ecology", *Globe and Mail* (January 20, 2009)

Highlights Of Budget 2009

Canada's Economic Action Plan

by Kirk Lamb

On January 27, 2009 the Federal Government tabled *Budget 2009 – Canada's Economic Action Plan* ("2009 Budget") and on February 6, 2009 the Minister of Finance introduced a Notice of Ways and Means Motion in the House of Commons to implement key elements of the 2009 Budget. The 2009 Budget and the Notice propose various personal, business and international tax measures, the most notable of which are discussed below.

A. Business tax measures

Corporate Tax Rates – Although no new corporate income tax rate changes were announced in the 2009 Budget, it does reiterate the previous commitment to reduce the general corporate income tax rate to 15% by 2012. The federal corporate income tax rate currently sits at 19%, but will decrease to 15% in three steps: 18% on January 1, 2010, 16.5% on January 1, 2011 and 15% on January 2012.

Small Business Limit – The small business deduction currently reduces the federal corporate income tax rate on the first \$400,000 of qualifying active business income of a Canadian-controlled private corporation ("CCPC"). The Budget proposes that the small business limit be increased from \$400,000 to \$500,000 effective January 1, 2009. The small business deduction continues to be phased out on a straight-line basis for corporations with taxable capital employed in Canada between \$10 million and \$15 million.

Accelerated Capital Cost Allowance – The 2009 Budget proposes that machinery and equipment acquired in 2010 and 2011 continue to benefit from a temporary 50% straight line accelerated capital cost allowance. In addition, the 2009 Budget introduces a temporary 100% capital cost allowance rate to eligible computer hardware and systems software acquired after January 27, 2009 but before February 1, 2011. The half-year rule will apply to machinery and equipment purchases but will not apply to purchases of computer hardware and software.

Mineral Exploration Tax Credit – The Mineral Exploration Tax Credit, which provides for a tax credit to flow-through share investors, was set to expire at the end of March 2009. The Budget proposes to extend the credit for one year for any flow-through share agreement entered into before April 1, 2010.

Acquisition of Control – The *Income Tax Act* currently deems control of a corporation to occur at the beginning of the day on which control was acquired unless an election is made for this provision not to apply. If the election is not made, this rule can result in unintended adverse tax consequences, particularly where a taxpayer intends to claim the lifetime capital gains exemption on the disposition of shares of a small business corporation. Budget 2009 proposes that this deeming rule not apply to the determination of whether a corporation is a "small business corporation" or a CCPC. This will ensure that the status of a corporation as a small business corporation or a CCPC does not change until the actual time of sale. The proposed amendment will retroactively apply to transactions that occurred after 2005, unless the taxpayer elected or was deemed to have elected not to have the rule apply.

Other business tax measures include, quarterly instalments of taxes for CCPCs, mandatory electronic filing for corporations that meet certain conditions and the elimination of tariffs on certain imported machinery and equipment.

B. International tax measures

Deductibility of Foreign Affiliate Financing – In 2007 the government enacted rules which would limit the deductibility of interest in situations where a Canadian corporation used borrowed funds to finance a foreign affiliate and a second deduction for the interest was available in the foreign jurisdiction. These rules were scheduled to take effect in 2012. In response to recent recommendations by the Advisory Panel on Canada's System of International Taxation ("Advisory Panel"), the 2009 Budget proposes to repeal these rules due to potential adverse effects the rules could have on foreign investment by Canadian businesses.

Non-Resident Trusts and Foreign Investment Entities – Draft rules relating to non-resident trusts and interests in non-resident entities were originally released in 1999. These proposals have received much criticism and have yet to be enacted. The 2009 Budget indicates that the government will accept the Advisory Panel recommendation to reconsider and consult on the draft proposals relating to non-resident trusts and interests in non-resident entities.

Foreign Affiliates – The Advisory Panel made recommendations relating to the treatment of income from foreign affiliates and capital gains on the disposition of shares of foreign affiliates. In the 2009 Budget, the government stated that it will consider the Advisory Panel's recommendations before proceeding with the foreign affiliate amendments.

C. Personal tax measures

Basic Personal Amount – The 2009 Budget increases the basic personal amount and the spousal and common-law partner amount from \$9,600 in 2008 to \$10,320 in 2009.

Personal Tax Brackets – The upper limit of the first personal income tax bracket, which is subject to a 15% tax rate, is increased from \$37,885 in 2008 to \$40,726 in 2009. The upper limit of the second personal income tax bracket, which is subject to 22% tax rate, is increased from \$75,769 in 2008 to \$81,452 in 2009.

Home Renovation Tax Credit – The 2009 Budget introduces a temporary tax credit for expenditures between \$1,000 and \$10,000 on renovations to a principal residence or a principal residence of a family member. Individuals will be able to claim a 15% non-refundable tax credit for expenditures for work performed or goods acquired after January 27, 2009 and before February 1, 2010. The credit will be family-based such that each family will be subject to the \$10,000 limit. Only expenditures for renovations that are of an "enduring nature" and are "integral" to the residence will be eligible. Certain expenditures, including purchases



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of tools, routine repairs or maintenance, expenditures for furniture, audio-visual electronics, or appliances and financing costs, will not be eligible for the home renovation tax credit.

Home Buyers Plan – The Home Buyers Plan currently allows a first-time home buyer to withdraw up to \$20,000 from a registered retirement savings plan to acquire a home. Budget 2009 proposes to increase the withdrawal limit from \$20,000 to \$25,000. This increase will apply to 2009 and subsequent calendar years for withdrawals made after January 27, 2009.

First-Time Home Buyers' Tax Credit – Budget 2009 proposes a non-refundable tax credit based on an amount of \$5,000 for first time home buyers who acquire a qualifying home after January 27, 2009. The credit will also be available for certain home acquisitions by or for the benefit of an individual who is eligible for the disability tax credit.

Other personal income tax measures include raising the level at which the National Child Benefit supplement and the Canada Child Tax Benefit are phased out, doubling the tax relief provided by the Working Income Tax Benefit, increasing the Age Credit amount and allowing

post-death reductions in the value of an RRSP or RRIF to be carried back and deducted against year-of-death RRSP/RRIF income inclusion.

D. Previously announced measures

Budget 2009 also confirms the government's intention to proceed with certain previously-announced tax measures, including, but not limited to, rules relating to the taxation and conversion of SIFT partnerships and trusts and draft amendments relating to functional currency tax reporting.

Youth Enjoy Hitmen Game

BD&P supports opportunities for volunteerism by its lawyers and staff. Catholic Family Service is a well-known Calgary not for profit organization, which provides supportive services in education and community environments that combine learning opportunities, early childhood, counselling school-based programming and volunteerism to any Calgarians in need. Chris Bruce, BD&P associate lawyer, has been volunteering with the organization and was intrigued by the Athletes Mentoring Program run by Catholic Family Service.

Athletes from Mount Royal College, SAIT and the University of Calgary are matched with youth who could potentially benefit from the program, with the plan that the athletes take the youth to regular practices and games. A group of youth in the program are shown in the photo here with Chris Bruce while attending a Hitmen hockey game in BD&P's Saddledome suite. For many, it was the first time attending an event at the Saddledome. The youth are holding a thank you card they thoughtfully prepared for the firm.



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