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ENERGY

M A T T E R S

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Liability Under the Climate Change Act

by Aaron N. Grach, Student-at-Law

INTRODUCTION

In late 2007, the *Climate Change and Emissions Management Act*¹ (the “Act”) and its attendant Regulations² (the “Regulations”) came into full force in Alberta. The Act and Regulations set up a framework under which greenhouse gas emissions are to be managed in Alberta, with a view to reducing them to 50% of 1990 levels by the end of 2020.

In addition to providing rules for emissions management, offsets, credits, and trading, the Act and Regulations contain certain reporting requirements and records retention rules and also set out penalties for non-compliance. *— continued on page 1*

in this issue:

| | |
|---|-------------|
| Liability Under the Climate Change Act..... | Front Cover |
| Kensington Energy Ltd. v. B & G Energy Ltd. and the ‘Shut-In Well’..... | 3 |
| Carbon Capture & Storage: Are We Ready For It? | 5 |
| Disclosing the Risks of Climate Change and Emissions Management | 6 |
| BD&P Energy Team | 8 |
| Energy Lawyers Contact Information | Back Cover |

– continued from cover

With this new regulatory regime and its penalty scheme, emitters must naturally consider, as part of their risk management strategies, their potential liabilities under the Act. This article is an overview of these liabilities and their legal and practical limitations.

REQUIREMENTS – TARGETS, REPORTING AND RECORDS RETENTION

The Act and Regulations set out a formula to calculate baseline emissions levels for facilities governed by the regime, and set generalized targets for emissions reduction. The methods available for meeting these targets include carbon offsets, credits and trading.

Integral to this target structure is the mandatory reporting requirement. Any facility that emits a specified gas in circumstances covered by the legislation must report it in the proper manner and within the prescribed time limits. In general, reports must be submitted annually. There are also requirements to retain records for specified periods of time under the Regulations.

SEARCH AND SEIZURE

The Act gives the Director broad investigatory powers in enforcing the Act or any compliance order. These powers include the right to enter facilities, conduct tests on equipment, take samples, seize relevant items and seize and copy documents. These powers may be backed with a court order if necessary.

COMPLIANCE ORDERS

The Director can issue a compliance order where a person has contravened the Act, whether or not the person has been charged or convicted for the contravention. The compliance order will specify any remedial or other management measures the person must then take, which may range from further records retention requirements to detailed action plans. A compliance order can be more stringent than the Regulations themselves, and failure to follow the order is itself a contravention of the Act.

Emitters are also subject to the costs incurred by the Director in enforcing a compliance order, and under the Act those costs are recoverable by an action in debt or by recovery against the sale of “land to which the compliance order relates”.

A compliance order and its associated costs can be registered against the land title, and constitute a charge not only on the specified land but also

on any contiguous or related land owned by the person in contravention. Furthermore, the Act says that this charge has priority over other security interests in that land.

ADMINISTRATIVE PENALTIES

Where a person (an individual or a facility, as the case may be) has contravened the Act or the Regulations, the Director may require the person to pay an administrative penalty. The penalty is levied by way of notice to the penalized person stating the grounds on which the penalty is assessed. The administrative penalty can include both an amount for each day on which the contravention occurs or continues, and a one-time amount to address any economic benefit the person has gained from the contravention. The former can be up to \$5000 per day, depending on the severity of the contravention, the degree of willfulness or negligence involved, history of non-compliance, mitigating factors and any other relevant factors. An administrative penalty can be appealed to the Environmental Appeals Board.

Any facility that emits a specified gas in circumstances covered by the legislation must report it in the proper manner and within the prescribed time limits.

OFFENCES

The Act also sets out certain offences, which may have more serious consequences, including higher fines as well as imprisonment for any individuals involved. These offences include (1) failure to provide information required under the Act or the Regulations, (2) providing false or misleading information, (3) contravening a compliance order, and (4) interfering with an investigation. Where a corporation commits an offence, any officer, director, or agent of the corporation involved in the contravention is liable to punishment whether or not the corporation itself is convicted. Conviction for offences requires more stringent proof than that required for an administrative penalty, i.e. a trial in a court of law.

For less serious offences, the maximum fine is \$50,000 for an individual, and \$500,000 for a corporation (there is an equal amount of

liability for breach of the reporting requirements under the SGER³). For more serious offences, the maximum amounts for individuals and corporations double, and in addition to paying a fine the individuals involved can go to prison for up to two years. According to the Act, the difference between a more serious and less serious offence, is whether the offence was committed “knowingly”. Presumably *knowingly* means with the willful intention to deceive or defraud. Whatever the intention, however, where an offender knew of a potential contravention but failed to do anything about it, it might be hard to convince a court that the emitter did not intend to deceive.

This brings us to a potential defence, the defence of due diligence. If the contravention was inadvertent, and the emitter can show that all reasonable steps were taken to prevent it, the person cannot be convicted under the Act. This defence does not apply to contraventions that are committed knowingly.

Notably, as with an administrative penalty, the offender is liable for each day or part day on which the offence continues. Further, the court may similarly require the offender to pay an additional amount equal to any economic benefit resulting from the contravention. Lastly, a person cannot be convicted for a contravention for which the person has already been assessed an administrative penalty. This last point raises the question of what circumstances will provoke an administrative penalty as opposed to a prosecution. The answer is yet to be seen. However, it may be noted that the due diligence defence applies only to prosecutions, and not to administrative penalties.

LIMITATION PERIOD

As mentioned, an offence committed knowingly may result in a higher penalty under the Act. However, since most emitters will not intentionally contravene the Act, the fact that a person can be penalized for an unknowing contravention might be more worrisome. Because of this, it is crucial for emitters to act with due diligence, so that they will have a defence if they are found in breach.

But emitters will undoubtedly prefer more certainty. In terms of risk analysis, one question is how long an emitter might be on the hook for a potential slip-up. In other words, how long must this risk or uncertainty stay “on the books”?



Another factor that affects liability in a practical sense is the records retention period prescribed by the Regulations.

The Act sets out a limitation period of two years for both the issuance of notice of an administrative penalty and the commencement of prosecution for an offence. The limitation period in each case begins on the later of (a) the date on which the contravention occurred and (b) the date on which evidence of the contravention first came to the notice of the Director.

Potentially, evidence of a contravention could come to light at any time. For example, such evidence might be discovered 10 or more years after the actual contravention occurred. Thus the relevant limitation period could potentially begin long after as well. What this appears to mean at first blush is that a corporation's liability under the Act is unlimited in time. Alberta Environment has reportedly taken just this position with at least one large emitter.

However, if the emitter keeps up with reporting requirements, and completes reports such as offset reports in a thorough manner, liability under the Act has more of a practical time limit. Under the common-law rules of discoverability, the limitation period depends on when the Director "knew or ought to have known" of a contravention. If evidence that could support a penalty or prosecution is contained in a submitted report, the Director must act on that evidence within the two years of the submission. This is because under the principles of discoverability, the Director is deemed to have knowledge of the contents of any documents in the possession of the Director's or his/her office. Furthermore, case law suggests that

the failure of the relevant department to read the report is no excuse. This is true regardless of how busy the department might be.

As for what an emitter can do to increase certainty, the more complete a report is, the less scope there will be for indefinite liability. Arguably, then, if an emitter possesses information that may invalidate an emission report, an offset claim, or a similar type of information, the emitter may be better off to include such information in its submission than exclude it. That way, the emitter will be able to argue that Alberta Environment "ought to have known" of the contravention or offence, based on the evidence they were provided.

Thus the limitation period prescribed by the Act does have the practical effect of providing some economic and operational certainty for emitters who act in good faith. However, discoverability will be a question of the circumstances of each particular case, and will depend on the nature of the evidence involved. If a contravention is not reasonably apparent from the information contained in a submitted report, it may come to the notice of the Director through other channels, and potentially at any time. Though the Director is required to exercise reasonable diligence in discovering such evidence, this does not include having to actively probe for such evidence beyond the regular reporting regime.

RECORDS RETENTION

Another factor that affects liability in a practical sense is the records retention period prescribed by the Regulations. These records retention periods are analogous to the seven-

year period found in the income tax context. There are two records retention periods under the Regulations: a seven-year period under the SGER,⁴ for records related to reporting a facility's specified gas emissions above levels set out in the Minister's *Specified Gas Reporting Standard* (currently 100,000 tonnes of CO₂e),⁵ and a three-year period under the SGRR,⁶ for records related to establishing a facility's baseline emissions intensity and to ongoing emissions intensity compliance reports. These retention periods may act as a practical limit to liability under the Act, because penalties, prosecutions, and defences under the Act will often depend on the availability of documentary evidence. Beyond the retention period such evidence will presumably be much harder to come by, though it may continue to exist in other locations and forms.

CONCLUSION

There are a number of factors involved in considering an emitter's liability under the *Climate Change and Emissions Management Act* and its related Regulations. There are two types of penalties, administrative penalties and penalties for specific offence convictions. The former are less serious, but they can add up, and they have no defence under the Act. The latter are more serious, but they may have a due diligence defence. Both types of penalties are subject to a limitation period of two years, but this period only starts when the Director would reasonably have had notice of a contravention, which may be long after the contravention occurred. The prudent emitter should therefore not only take all reasonable steps against a breach of the Act or the Regulations, but also provide thorough reports to Alberta Environment to prevent surprises at a later date. Finally, though there are no absolute time limitations, the records retention periods of 3 or 7 years, depending on the context, may provide a practical end-point to liability under the Act.

Footnotes

¹S.A. 2003, c. C-16.7

²*Administrative Penalty Regulation*, Alta. Reg. 140/2007 (the "APR"); *Specified Gas Emitters Regulation*, Alta. Reg. 139/2007 (the "SGER"); *Specified Gas Reporting Regulation*, Alta. Reg. 251/2004 (the "SGRR").

³*Supra* note 2.

⁴*Supra* note 2.

⁵Specified gases with a global warming capacity equivalent to 100,000 tonnes of carbon dioxide.

⁶*Supra* note 2.

Kensington Energy Ltd. v. B & G Energy Ltd. and the 'Shut-In Well'

by Jerrad Kubik, Student-at-Law

INTRODUCTION

In this important Alberta Court of Appeal decision of *Kensington Energy Ltd. v. B & G Energy Ltd.*¹ the Court of Appeal reversed a 2005 trial decision relating to the independent operation of the 'shut-in well clause' and its ability to deem production and extend an oil and gas lease in the secondary term.

FACTS

The facts of the case involved a contest between Kensington Energy Ltd. ("Kensington") and B&G Energy Ltd. ("B&G") concerning the validity of several petroleum and natural gas leases (identical as to form) then held by Kensington (the "Kensington Leases"). The Kensington Leases were acquired by a predecessor of Kensington in 1987. A single gas well was spud on the lands underlying the Kensington Leases during their primary term in 1992. The well commenced production in 1996 until it was shut-in in 2001. Shortly thereafter, Kensington acquired the Kensington Leases and in 2003, resumed production of the well from another formation. Shut-in payments were timely made during the period of non-production.

Just prior to Kensington's acquisition of the Kensington Leases, B&G obtained a series of top leases to the lands in question. After caveating its interests against the title to the lands, B&G, through its land agent, challenged the validity of caveats filed in relation to the Kensington Leases, claiming that the leases had expired as there had been no production between 2001 and 2003.

Kensington argued that the Kensington Leases had not expired on the basis that they had been shut-in the well in accordance with good oilfield practice as permitted under the Kensington Leases and, in addition, shut-in payments were at all times timely made during the period of non-production.

TRIAL DECISION

At trial, the Court of Queen's Bench of Alberta held, despite refusing to hear expert evidence on the issue, the shutting-in of the original natural gas well did not qualify as shutting in "pursuant to good oil field practices" as defined by the third proviso of the Kensington Leases' habendum clause (the "Third Proviso"), which provided in relevant part:

And further always provided that... if at any time after the expiration of the said term production of the leased substances has ceased and the Lessee shall have commenced further drilling or working operations within ninety (90) days after the cessation of said production, then this Lease shall remain in force so long as any drilling or working operations are prosecuted with no cessation of more than ninety (90) consecutive days,... provided further that notwithstanding anything hereinbefore contained or implied to the contrary... if any well on the said lands or on any spacing unit of which the said lands or any portion thereof form a part, is shut-in, suspended or otherwise not produced for any cause whatsoever which is in accordance with good oil field practice, the time of such interruption or suspension or non-production shall not be counted against the Lessee. [Emphasis added]

In the trial judge's view, the well was shut-in, not because of production problems, but because it had become a dry hole. In fact, when actual production ended in 2001, Kensington's predecessor removed its surface equipment from the site and in 2003, Kensington permanently abandoned the original producing zone. As a result, the court held that Kensington could not rely on the Third Proviso to extend the Kensington Leases.

The trial judge also held that Kensington could not rely on the 'shut-in well clause' ("Shut-In Clause"), which provided:

Subject to the provisions hereinbefore set forth, if all wells on the said lands are shut-in, suspended or otherwise not produced during any year ending on an anniversary date, the Lessee shall pay to the Lessor at the expiration of each such year, a sum equal to the delay rental hereinbefore set forth and each such well shall be deemed to be a producing well hereunder, provided that this clause shall not impose an obligation upon the Lessee to make the payment of a sum equal to the delay rental unless all wells on the said lands are shut-in, suspended or otherwise not produced for a period of ninety (90) consecutive days in any such year. (Emphasis added)

In the view of the trial judge, the phrase “subject to the provisions hereinbefore set forth” at the beginning of the Shut-In Clause meant that the Shut-In Clause only applied to wells that were “shut-in, suspended or other not produced in accordance with good oil field practices”, as set forth in the Third Proviso. As the trial court had already determined that the well was not shut-in in accordance with good oil field practices, the Shut-In Clause did not apply and the Kensington Leases had expired in accordance with their terms.

COURT OF APPEAL DECISION

On appeal, the majority of the Alberta Court of Appeal disagreed with the trial judge and reversed the decision. While Kensington had appealed the trial decision on the basis of three issues, the Court of Appeal concluded that it would only be necessary to deal with one: whether the trial judge erred in concluding that the Shut-In Clause could only continue the Kensington Leases if the well was shut-in in accordance with the good oil field practices requirement of the Third Proviso.

With respect to this issue, Kensington argued that the Third Proviso did not in any way establish a condition precedent to the deemed production that would result from the shut-in well payments made pursuant to the Shut-In Clause. In Kensington’s view, Shut-In Clause operated independently from the third proviso and provided a lessee with an additional and distinct way of preventing the termination of the Kensington Leases.

Despite the apparent limiting “subject to” words contained within the Shut-In Clause, the Court of Appeal held that there was no necessary connection between the Shut-In Clause and the good oil field practice requirements contained within the Third Proviso. The Court found that the “subject to” words could reasonably refer to several other provisions within the lease and that the lease itself did not explicitly state that the deemed production resulting from the shut-in payments was conditional upon the Third Proviso. Therefore, the Court of Appeal held that the Shut-In Clause operates independently from the Third Proviso and that the leases were extended in the secondary term through the shut-in payments made to the lessor.

CONCLUDING THOUGHTS

The Court of Appeal also noted that the “subject to” words found at the beginning the Shut-In Clause did, however, potentially engage two further concepts (para. 37):

- (a) no delay rentals arguably need to be paid to keep the lease in force if it would stay in force under one of the provisos, for example, under the exception for wells shut-in in accordance with a good oil field practice, or the interruption of drilling for causes beyond the lessees control, and
- (b) the payment of delay rentals cannot revive a lease that has been terminated at any prior point because of a failure of production or deemed production, for example where a lease terminated because a well was shut in other than in accordance with good oil field practice and no delay rental was paid.

The Court of Appeal asked, but refrained from answering, what is arguably the “next logical question” and that is, if the lease is being continued under the Third Proviso and the lessee fails to make timely

payment of the delay rental, will the lease terminate? Do the words “subject to” mean that if the lease is continued under the Third Proviso, then it will not be terminated under the Shut-In Clause? On that question, the Court held that “since in this case shut-in payments were made, the point does not arise and should be left for another day.”

Thus, while the Court of Appeal clarified the fact that the Shut-In Clause has an independent function from the Third Proviso in the Kensington Leases and leases like the Kensington Leases, the question of whether the Third Proviso is completely independent of the Shut-In Clause in the same way was expressly not decided.

As a result, we recommend that even if a lessee shuts-in or suspends a well in accordance with good oilfield practice, or for any other reason permitted under the third proviso of its lease; that the lessee nonetheless make timely shut-in payments under the shut-in clause of its lease.

Footnotes

¹2008 ABCA 151

What We’ve Been Up To

John Goetz and Morella DeCastro have presented a paper, *Development of Carbon Emissions Trading in Canada* at the Canadian Petroleum Law Foundation’s (CPLF) – Jasper Conference on June 26, 2008.

John Lowe and Jonathan Liteplo have presented a paper, *Recent Regulatory and Legislative Developments of Interest to Oil and Gas Lawyers 2007-2008*, at the CPLF Conference in Jasper in June, 2008.

Alicia Quesnel is Past President of the CPLF.

Carolyn Wright is currently a Director of the CPLF and a member of the Organizing Committee for the CPLF Jasper Conference as well as co-chair of the CPLF Kananaskis Seminar in Fundamental Oil & Gas Law. Carolyn is an executive member of the Canadian Bar Association (“CBA”) Natural Resources Section and also teaches a bi-annual course on *Freehold Lessor Estates* to the Canadian Association of Petroleum Land Administrators (“CAPLA”).

Candice Jones is a Director-at-Large Legal of the Petroleum Joint Venture Association (“PJVA”).

Morella de Castro is Vice Chair of the International Business Law Section of the CBA.

Stuart Money annually teaches “A Practical Guide to Title Review and Acquisitions” and “An Interpretive Approach to Dealing With ROFR Issues for the Canadian Association of Petroleum Landmen Continuing Education Program.”

INTRODUCTION

Carbon dioxide (“CO₂”) is responsible for over 60% of the “greenhouse effect”. Once emitted, CO₂ and other greenhouse gases (“GHG”) remain in the atmosphere for an extensive period of time. The scientific community has suggested that, even if the global community was to take the most drastic measures available in an attempt to mitigate the effect of global warming, mitigation efforts would not become perceptible until the mid-2030s. Canada is a member of the Kyoto Protocol, and as such in its efforts to reduce GHG emissions, including CO₂, it has proposed a regulatory framework that targets the absolute reduction of GHG by 20% below 2006 levels by 2020. Alberta’s climate change program intends to cut projected GHG emissions to 14% below 2005 levels by 2050. Its expected that Carbon capture and storage (“CCS”) implementation will account for approximately 70% of the anticipated reduction. Up to \$500 million in federal and provincial funding could be directed towards these initiatives. The Alberta Government is the first one in North America to direct dedicated funding to the implementation of CCS across industrial sectors.¹ Based on the final report of the Canada-Alberta ecoENERGY Carbon Capture and Storage Task Force, the two governments have agreed to work together to facilitate and support CCS development opportunities in Canada², and that should include establishing a clear regulatory framework.

WHAT IS CARBON CAPTURE AND STORAGE (CCS)?

CCS is a process by which CO₂ is captured or extracted from gas streams produced by the refining of hydrocarbons, power generation, fertilizer manufacturing plants and other industries, with the objective of reducing GHG emissions. Once captured, the CO₂ is then transported to the storage location, injected underground and stored indefinitely. As the storage techniques are in the early stages, they are not infallible and leakages may occur. As a consequence continuous monitoring is required throughout the life of the project, which may be centuries.

Storage sites for this type of project include (1) depleted oil, gas or coalbed methane reservoirs, (2) deep saline formations, and

Carbon Capture & Storage Are we ready for it?

by Morella M. De Castro and
Kristen Dick, Summer Research Student

(3) salt caverns. Of particular interest in the short-term is the use of CO₂ injection in enhanced oil or enhanced gas recovery projects, from which revenue may be generated to offset some of the capture costs of CCS projects³ and in certain instances may create considerable opportunities.

Two major barriers that exist to the immediate implementation of CCS technology are the cost and a lack of regulatory framework. Of primary concern to many potential CCS operations is the confusion surrounding ownership of subsurface storage rights and the process by which the rights might be obtained.

OWNERSHIP ISSUES

It is not yet determined nor clear how the rights to store or dispose CO₂ will be regulated in Alberta (storage and disposal may have different treatments). So far, the Energy Utilities Board in its Directive 65 outlines the approval requirements for a disposal project, which includes obtaining a letter of consent from the Crown, freehold mineral or lease holder. However, the ownership and obtaining of approval issues are not that simple once split titles (particularly when the right to the gas and the petroleum substances are held by different parties), multiple working interest holders or the area covered by a particular underground formation are considered. The principal question arising for an operator of a CCS project will be “From whom do the disposal rights need to be acquired?” It is unclear whether these rights must be sought from either the gas owner or the petroleum

owner, or from both⁴, although it may be advisable to request consent from all of the working interest holders that may be affected by the storage of CO₂. Another aspect of ownership to consider is the freehold lease and the disposal or storage rights, if any, granted under the lease. The issue relates to the wide variety of freehold leases that have been granted in the past with different terms and conditions that may or may not grant disposal or storage rights. As a result, a close review of the freehold lease would be required in order to determine if the CCS project can be conducted on those particular lands.

In 1994, amendments were made to the *Mines and Minerals Act*⁵ (MMA) to clarify ownership in the context of natural gas storage: (1) a person who owns the title to petroleum and natural gas in any land also owns the storage rights with respect to every underground formation within that land. “Storage rights” are defined in the MMA as “the right to inject fluid mineral substances into a subsurface reservoir for the purpose of storage”, and (2) where title is split between a gas owner and a petroleum owner, the owners of the separate estates are to be treated as co-owners of the storage rights with respect to every underground formation within that land. The amendments were made with specific reference to natural gas regimes, so in terms of applying the concepts to CO₂ disposal, there are a few issues to consider. First, there are only two types of co-ownership in Alberta, a *joint tenancy* and a *tenancy in common*. There is a statutory presumption in favour of tenancy in common, which is characterized by two or more

persons having equal or unequal undivided shares in a physically undivided property, with each entitled to possession of the whole property.⁶ It is also unclear whether an operator would require the consent of all owners for CO₂ storage rights or not. Nor is it clear what the requirements would be for obtaining consent from the different co-owners with various types of interests in a target formation.⁷

CONCLUDING THOUGHTS

In addition to a lack of clear legislative direction, there is further confusion with respect to how the recent split of the AEUB will impact regulatory issues for CCS operators. The *Alberta Utilities Commission* (“AUC”) is responsible for regulating carbon emitters from a construction and rate regulation standpoint, while the *Energy Resources Conservation Board* (“ERCB”) is now responsible

for storage caverns.⁸ This will undoubtedly add to the general confusion surrounding implementation of the technology.

These regulatory issues and ownership questions, combined with high costs, lack of clarity in legislation and potential liability for operators, have prevented or hindered rapid development and implementation of CCS technology in the province. In the near future Alberta’s energy will likely continue to come from fossil fuels, and CCS appears to be one of the only methods available that allows for the use of this type of fuel while reducing the emission of GHG. It will be necessary for governments to take immediate and committed action to remove the financial, legal and regulatory barriers to CCS technology, and to clarify the present uncertainty with regard to legislative and regulatory application.

Footnotes

¹ “Alberta to cut projected emissions by 50 per cent under new climate change plan”, Alberta Energy News Release (January 24, 2008), online: <http://alberta.ca/acn/200801/22943ACC446ED-ED74-6A1E-6CF263E59920969B.html>

² “Governments of Canada and Alberta release Carbon Capture and Storage Task Force report”, Alberta Energy News Release (January 31, 2008), online: <http://Alberta.ca/ACN/200801/23030D1816465-D42A-0778-1EED407E08C63CE1.html>

³ Bankes, Nigel, et. al., “The Legal Framework for Carbon Capture and Storage in Alberta” (2008) 45 Alta. L. Rev. 1-46. (Bankes)

⁴ *Ibid*

⁵ S.A. 1994, c.22.

⁶ Black’s Law Dictionary. Sixth Edition by the Publisher’s Editorial Staff, 1990. page 1466.

⁷ Bankes, *supra*. at 27

⁸ online, www.ercb.ca and www.auc.ab.ca



Disclosing the Risks of Climate Change and Emissions Management

by Aaron Rogers, Student-at-Law

INTRODUCTION

The adequacy of climate change and emissions management disclosure is becoming an increasingly significant issue in Canada and the U.S. Pressure being brought by both regulators and interest groups to improve disclosure in these areas is a direct result of increasing public concern over the environmental effects of development, the uncertainty surrounding climate change and the movement towards regulation of greenhouse gas emissions taking place across North America.

DISCLOSURE REQUIREMENTS

Reporting issuers in Canada are required to file continuous disclosure documents on a periodic basis, including, among others, financial statements, management’s discussion and analysis, material change reports and in some cases an annual information form. The common disclosure standard with respect to these filings is to disclose all “material” information, which is generally defined as information that would reasonably be expected to have a significant effect on the market price or value of the issuer’s securities. As a result of

this standard, the key issue for reporting issuers with respect to the disclosure of climate change and emissions regulation is whether their effects are material or not.

ASSESSING MATERIALITY

Although it may be tempting to dismiss environmental issues such as climate change and emissions management activities as immaterial, particularly for large publicly traded entities, recent pressure from interest groups and guidance from regulators indicates that, in some cases, climate change and emissions issues may now be significant enough to be considered material, warranting disclosure.

Beginning in 2002, the Carbon Disclosure Project has sent annual questionnaires to the largest companies in the world asking them to describe the implications of climate change on their operations and on shareholder value. The Carbon Disclosure Project currently represents a group of institutional investors with combined assets under management exceeding \$57 trillion dollars and sends its questionnaire to approximately 3000 companies worldwide, including the 200 most valuable organizations listed on the TSX. The 39 Canadian

members of the Carbon Disclosure Project consists of a number of large investment funds including the Ontario Teachers Pension Plan, the Ontario Municipal Employees Retirement System (OMERS) and the Caisse de depot et placement du Quebec.

Building on the activities of the Carbon Disclosure Project, a petition was made to the U.S. Securities and Exchange Commission (the “SEC”) on September 18, 2007 by Ceres, Environmental Defence and a group of asset management companies representing over \$1.5 trillion dollars in assets. The petition asked the SEC to clarify that existing securities laws in the U.S. require the disclosure of material climate change risks and to begin examining the adequacy of issuers’ disclosures in their 10-K and 10-Q filings. To date, the SEC has not publicly responded to this petition.

These and other actions indicate that the impacts of climate change and emissions management activities appear to be clearly material, at least to institutional investors. Given the observed change in public sentiment towards environmental issues, reporting issuers may also want to consider whether corporate reputation, stakeholder relationships and environmental stewardship concerns are significant enough to elevate climate change and emissions management issues to a material level even where their financial impact would not reach the issuer’s materiality threshold. Additionally, issuers should be aware that the combination of non-material issues could result in the materiality threshold being reached.

ADEQUATE DISCLOSURE

Once it has been determined that climate change and emissions management issues are material or significant enough to be disclosed, the focus becomes the appropriate disclosure of the impact of such issues on the reporting issuer.

On February 29, 2008, the Ontario Securities Commission (the “OSC”) released *OSC Staff Notice 51-716 Environmental Reporting (“Notice 51-716”)*, which summarized the results of a targeted review of the adequacy of environmental risk disclosure by various public issuers. The overriding findings of the review were that boilerplate disclosure of environmental issues is insufficient to meet disclosure requirements and that quantification of the impacts of environmental risks and protection requirements is required where possible. In its 2007 Continuous Disclosure Report released in February 2008, the Alberta Securities Commission (the “ASC”) echoed the OSC’s position that boilerplate disclosure of environmental issues will be considered a deficiency in continuous disclosure documents. The clear implication from the reviews conducted by the OSC and ASC is therefore that current disclosure practices in these areas are generally inadequate. As such, Notice 51-716 and similar reviews should likely be regarded as a wake-up call to reporting issuers to review the adequacy of their disclosure in a number of core environmental areas.

The guidance provided in *Notice 51-716* can be extended to the climate change and emissions management context in a number of ways. At its most basic level, climate change disclosure should recognize the current uncertainty regarding emissions legislation in Canada. While Alberta is the only Canadian jurisdiction to have passed legislation and regulations restricting emissions, both British Columbia and

Manitoba have recently moved towards implementing their own emissions reduction system: British Columbia has tabled bills to enact both a carbon tax and an emissions cap and trade system, while Manitoba has signalled its intention to enact legislation to facilitate compliance with the Kyoto Accord. Further, the Western Climate Initiative is progressing towards the development of a regional cap-and-trade system to potentially be implemented by its members which include the Canadian provinces of Manitoba and British Columbia and also Saskatchewan and Ontario as observers. Reporting issuers should also recognize the potential applicability of forthcoming federal emissions regulations and how the differences between provincial and federal legislation might impact them. For example, the emissions of upstream oil and gas facilities in Alberta are too low to be regulated under the current Alberta regime but are expected to be captured by the proposed federal Regulatory Framework.

In addition to regulatory uncertainty, reporting issuers are required to disclose environmental policies fundamental to operations and the steps taken to implement such policies. Given the available compliance mechanisms contained within both the Alberta regulations and the proposed federal Regulatory Framework, issuers might also disclose their chosen compliance strategy and actions taken towards achieving compliance. Such disclosures could include contracts for offset purchases or the investigation and purchase of emissions abatement technologies.

Moving beyond qualitative disclosure, reporting issuers would be advised to attempt to quantify the impact of both internal and external emissions management activities upon their operations. In some cases, these activities may materially impact income and capital expenditures. Quantification begins with an understanding of the regulatory restrictions upon the issuer’s emissions and an assessment of expected performance relative to that standard. Given the compliance strategy chosen by the issuer, the expected cost of compliance may be ascertainable using market information on the cost of offsets and technology fund contribution rates. Emitters may be able to quantify current and expected expenditures on abatement technologies in some cases, but it may be more difficult in others, especially in the case of future capital expenditures. Any future cost estimates should be qualified appropriately in the disclosure. The cost of purchasing credits or offsets to achieve regulated emission reduction levels may be estimated, but such estimates may need to be qualified in certain instances where the cost of the credit or offset may fluctuate with the market.

CONCLUSIONS

Given the apparent “shot across the bow” of Canadian reporting issuers by the OSC and the position taken by the ASC on boilerplate disclosure, ensuring the adequacy of climate change and emissions management disclosure deserves attention. The clear indication from regulators that boilerplate disclosure will not be considered a sufficient disclosure practice highlights the importance of more comprehensive disclosure that recognizes the potential impacts of climate change and emissions management regulations and practices and wherever possible, quantifies such impact and addresses the steps to be taken in the particular circumstances faced by the reporting issuer.



Energy: Transactional

BD&P's Energy Transactional Team of corporate practitioners are recognized and respected leaders in their field, advising on all aspects of domestic and international energy projects and transactions, joint ventures, alliances and mergers and acquisitions.

We represent a diverse range of clients in the petroleum industry including explorers, developers, producers, pipeline and transportation owners and operators, facilities owners and operators, lenders, public and private investors, marketers, aggregators, retailers and traders.

Our practitioners work closely with other professionals in the firm, drawing on the depth of knowledge of lawyers in tax, securities, construction, intellectual property and technology, employment and labour, and oil and natural gas and electricity regulatory law. We are active in a number of professional organizations relevant to the industry including the PJVA, CPLF, SEPAC, CAPL, Natural Resources Subsection of the CBA and the Institute for Energy Law.

This Team offers strong legal skills, practical and experienced business advice, innovative solutions and timely response to meet the specific needs and objectives of our clients.

SIGNIFICANT AREAS OF SERVICE:

- Development of opportunities in Alberta's oil sands including front-end engineering and design, engineering, procurement, construction management and construction
- Leading edge projects such as coal bed methane projects
- Joint venture, farmout, operating, royalty, participation and transportation agreements
- Acquisitions and dispositions of oil and natural gas properties and facilities
- Share transactions involving both private and public companies
- Natural gas marketing issues and sales agreements
- Construction, financing and operating of petrochemical plants and pipelines
- Corporate reorganizations
- Environmental issues
- Oil and natural gas taxation issues including cross-border transactions
- Oil and natural gas financings
- Co-generation projects
- Onshore and offshore drilling contracts
- International transactions
- Due diligence reviews, including title reviews and opinions
- Surface rights work
- First Nations consultation advice

Energy: Litigation

BD&P's Energy Litigation Team has extensive experience in all oil and gas related issues giving rise to litigation. The team compliments and is complimented by the strength of the firm's energy law practice, enabling the litigators to work closely with colleagues in order to provide all the resources key to resolving the client's oil and gas issues.

This Team regularly appears before all level of Alberta's Courts, in courts of other provincial jurisdictions, and before regulatory and administrative tribunals. In addition, the Energy Litigation Team has significant experience in the alternative dispute resolution forums of mediation and arbitration. In order to accomplish our clients' objectives, the BD&P energy litigators are committed to finding practical, efficient and cost-effective solutions for our clients in all contentious oil and gas related matters.

SIGNIFICANT AREAS OF SERVICE:

- Joint Ventures
- Farmout Agreements
- AMI's
- Royalty disputes
- Royalty or title claims by First Nations or by the Federal Crown as their trustee
- Accounting disputes
- Operating disputes
- Fiduciary duties
- Lease interpretations including rights of first refusal and other title questions
- Environmental liabilities
- Oil and gas evaluation disputes

Energy: Regulatory

BD&P's Energy Regulatory Team has a wealth of experience involving all aspects of oil & gas and electricity regulatory proceedings, including projects subject to federal and/or provincial environmental assessment legislation. Our lawyers appear regularly before the National Energy Board, the Alberta Energy and Utilities Board, the Alberta Environmental Appeal Board, Environment Canada, the Alberta Surface Rights Board, the Northwest Territories Public Utilities Board, the British Columbia Utilities Commission and other regulatory authorities in other provinces and territories. In addition, BD&P has acted as counsel in regulatory appeals and judicial review applications in the Alberta Court of Queen's Bench, the Alberta Court of Appeal, the Federal Court and the Supreme Court of Canada.

The BD&P Energy Regulatory Team represents oil & gas producers, oil sands producers, owners of intra-provincial, inter-provincial and international transporters of natural gas and crude oil pipelines, owners of NGL extraction plants, petrochemical facilities and refineries, proponents of LNG projects, owners and proponents of generating plants, owners of regulated electricity transmission and distribution facilities, regulated and unregulated retailers of electricity and gas services, buyers and owners under Power Purchase Arrangements, and energy marketers and importers/exporters.

In recent years, BD&P has been on the leading edge of restructuring in Alberta's electricity and natural gas marketplaces.

SIGNIFICANT AREAS OF SERVICE:

Oil & Gas:

- securing facility, environmental and land use planning approvals for oil and gas projects of all scale and scope — oil and gas wells, gas processing facilities, pipelines, oil sands projects, NGL extraction plants, petrochemical plants, refineries and LNG terminal facilities
- representing clients in tolls, tariff and access proceedings for natural gas and crude oil pipelines
- acting for clients in rateable take disputes, common carrier and common processor applications and resource conservation and enhanced recovery schemes
- representing project proponents in land acquisition and compensation proceedings
- providing counsel on regulatory matters involving consultations and disputes with local land owners and non-governmental organizations
- providing counsel on First Nation matters related to oil and projects, including consultation obligations and treaty and traditional land access
- advising market participants on issues arising under affiliate codes of conduct.

Electricity:

- representing clients in rates and tariff proceedings involving electric utilities and the Alberta Electric System Operator
- securing facility, environmental and land use planning approvals for electric transmission lines and co-generation, simple/combined cycle and hydro generating facilities
- advising market participants on issues arising under affiliate codes of conduct, market participation rules and the financial settlement rules of the Alberta Independent System Operator
- representing project proponents in land acquisition and compensation proceedings
- providing counsel on regulatory matters involving consultations and disputes with local land owners and non-governmental organizations
- providing counsel on First Nation matters related to electric facilities, including consultation obligations and treaty and traditional land access



Energy: Climate Change & Emissions Trading

BD&P's Climate Change & Emissions Trading Team is up to date with the latest information and advice regarding Climate Change regulations and Emissions Trading. Members of our Team have worked on significant carbon offset purchase and sale agreements, offset aggregation agreements, CO₂ supply agreements for Enhanced Oil Recovery (EOR) and regulation reviews. We are currently involved in 2 of Alberta's first Carbon Capture and Storage (CCS) and EOR Pilot Projects. Members of our team have written numerous articles on Climate Change issues ranging from The Development of Emissions Trading in Canada, the Federal Regulatory Framework on Air Emissions, Corporate and D&O Liability under the Climate Change and Emissions Management Act, Risk Disclosure for Climate Change and Emissions Management for Public Companies and Carbon Capture and Storage.

Our Team works closely with other professionals in the firm drawing on the depth of knowledge of lawyers in energy, construction, oil and natural gas, intellectual property and technology, tax, securities, and electricity regulatory law.

SIGNIFICANT AREAS OF SERVICE:

- ◆ Advice on the Alberta Climate Change and Emissions Management Act, the Specified Gas Emitter Regulations and the new Federal Regulatory Framework
- ◆ Advice on impact of legislation and compliance strategies for emitters and smaller energy producers
- ◆ Advice on emission trading and credit purchase and sale agreements
- ◆ Advice on creating, structuring and investing in offset generation projects for regulated and non-regulated entities
- ◆ Advice on creating an Emissions Exchange
- ◆ Advice on Alternative Energy Projects with Carbon Credit Potential
- ◆ Advice on front-end engineering and design (FEED) contracts and EPC contracts for Alternative Energy and CCS projects.
- ◆ Advice on wind power surface leasing, farmout, joint venture and royalty agreements

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