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on record

ENERGY

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On Record Contents:

Criminal Conspiracy Or Strategic Alliance? Understanding Recent Amendments to the Competition Act (Canada)
Page 1

Exclusion of Liability Clauses
Page 3

When Is A Letter of Intent a Binding Contract?
Page 4

Honouring the Right of First Refusal
Page 6

DIRECTIVE 074: The ERCB Moves Towards More Stringent Tailings Pond Management
Page 8

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Criminal Conspiracy Or Strategic Alliance?

Understanding Recent Amendments to the Competition Act (Canada)

by Alicia Quesnel

The New Dual Track

The amendments to the *Competition Act* (Canada) that relate to the new "dual track" approach to agreements between competitors will come into effect on March 13, 2010.

The "dual track" approach more clearly delineates those limited types of agreements between competitors that are, by their nature, anti-competitive, from the broader class of agreements between competitors that could have pro-competitive effects.

The current criminal conspiracy provisions (section 45) have been significantly narrowed in application; however, they are now *per se* unlawful (in that there is no longer a requirement to establish an undue effect on competition) and are intended to capture only the most egregious restraints on competition—agreements to fix prices, allocate markets or restrict output.

Other types of agreements between competitors will be reviewable under the new "civil" provisions (section 90.1) if they lessen or prevent or are likely to lessen or prevent, competition substantially in a relevant market. Agreements between competitors and other persons will also continue to be reviewable under other provisions of the Competition Act (Canada), including the bid rigging provisions, the merger provisions and joint abuse of dominance provisions (conducted jointly).

Criminal Conspiracy

As noted above, the new criminal conspiracy provisions are much narrower in scope than the current criminal conspiracy provisions. Subject to an "ancillary restraints defence" which we discuss below, the new criminal offenses are *per se* unlawful. There is no need to show any undue effect on competition resulting from the conspiracy.

The elements of the new criminal conspiracy provisions are:

- the existence of an agreement or understanding (which may be written or merely inferred from conduct);
- between two or more persons that are competitors or potential competitors;
- that fix prices, allocate markets or restrict the supply of a product or service; and
- that is not ancillary to a broader strategic arrangement.

Each of these elements is briefly discussed.

The Existence of an Agreement

An agreement for the purpose of section 45 is, formally or informally, a "meeting of the minds" pursuant to which two persons arrive at an understanding, whether explicitly or tacitly, to engage in the type of conduct prohibited by section 45. The offense is established by virtue of the agreement itself. It is unlawful to conspire with a competitor or potential competitor to fix prices, allocate markets or restrict the supply of a product or service, even if no steps have been taken by the competitors to implement the agreement.

While the sharing of competitively sensitive information does not, in and of itself, establish the existence of an unlawful conspiracy, parallel conduct coupled with facilitating practices, such as sharing competitively sensitive information, activities that assist competitors in monitoring each other's prices, or conduct otherwise consistent with the existence of an agreement, may be sufficient to prove the existence of an agreement.

Competitors and Potential Competitors

Section 45 currently applies to agreements between any two or more persons. Under the new provisions, section 45 will only apply to agreements between competitors in a relevant market, or between persons that would be competitors, but for the agreement or arrangement. As the Bureau describes in its draft guidelines:

> As long as the parties are offering, or contemplating the offer of, the same or otherwise competing goods or services in the same or otherwise competing regions, the Bureau will generally conclude that the parties are in competition with each other for the supply of such goods or services.

Price Fixing, Marketing Allocation and Output Restrictions

Under the current section 45, any type of conduct that injures competition unduly is potentially criminally actionable. Under the new section 45, only agreements that relate to fixing or controlling prices, allocating markets or restricting supply/output are criminally actionable.

Price Fixing. It is a criminal conspiracy for competitors to agree to "fix, maintain, increase or control the price for the supply" of a product or service. This includes any element of price, including the elimination of reduction of discounts, promotional allowances or price concessions, surcharges, credit terms, increases to prices and pricing methodologies.

Market Allocation. It is a criminal conspiracy for competitors to agree to "allocate sales, territories, customers or markets for the production or supply" of the product or service. These types of agreements include agreements not to compete with respect to specific customers, or groups of types of customers, in certain regions or market segments or in respect of types of transactions or products.

Output Restrictions. It is a criminal conspiracy for competitors to agree to "fix, maintain, control, prevent, lessen or eliminate the production or supply of " a product or service. Output restrictions include limiting the quantity of a product or service supplied or limiting increases in the quantity of a product or service supplied, whether by methodology or a fixed amount, or even an agreement to discontinue the supply of a product or service.

Ancillary Restraints Defence

An agreement between competitors that would otherwise constitute a criminal conspiracy, will not be criminally actionable under section 45 if it is "directly related to and reasonably necessary for giving effect to, a broader and lawful agreement" that includes the same parties. Examples include:

- a non-compete clause found in an employment agreement or an agreement for the sale of assets or shares between the parties;
- an agreement to abstain from making material changes to a business pending the consummation of a merger; and
- a non-compete obligation between the parent undertakings and a joint venture, where such obligations correspond only to the products, services and territories covered by the joint venture agreement.

Effectively, the "agreement" that would otherwise violate section 45 must be ancillary to, and reasonably necessary to promote or facilitate the main objective of the agreement (which does not violate section 45). It doesn't have to be the least restrictive if these are not practical from the business circumstances.

The Civil Provisions

New Section 90.1 will permit the Competition Tribunal to exercise certain remedies in relation to agreements between competitors and potential competitors that are, or are likely, to substantially lessen or prevent competition in a relevant market. Agreements between competitors that are not criminally actionable under new section 45 or reviewable under other provisions of the *Competition Act* (such as the merger provisions or abuse of dominance provisions) are per se lawful. If, however, the Competition Tribunal determines that such agreements lessen or prevent, or are likely to lessen or prevent, competition substantially in a relevant market, the Competition Tribunal can prohibit the enforcement of the agreement or it can exercise a wide range of remedies designed to address the anti-competitive impact.

The elements of section 90.1 are as follows:

- the existence of an agreement or understanding (which may be written or merely inferred from conduct);
- between two or more persons that are competitors;
- that does not violate section 45 of the Act; and
- that prevents or lessens, or is likely to prevent or lessen, competition substantially in a market.

We have discussed the first three elements in relation to section 45 of the Act. The fourth element requires some elaboration.

Prevention of Lessening of Competition

A substantial lessening or prevention of competition results from agreements that are likely to create, maintain or enhance the ability of the parties to the agreement to exercise market power. This must be assessed from time to time during the term of the agreement in light of any changes to the market structure that may have occurred. In assessing the competitive effects of a transaction, the Competition Bureau will consider, among other factors:

- the relative market shares of the parties to the agreement;
- the impact on competition in terms of price, product/service choice or other significant competitive variables;
- the degree and scope of products and services that are impacted by the arrangement;
- the extent to which the agreement reduces the incentive or ability of the parties to compete independently or reduces their control over assets a needed to compete independently;
- the extent to which the parties are required to or share competitively sensitive information between them, who the information is exchanged between and/or the agreements/policies the parties have in place to limit the disclosure of competitively sensitive information;

As these amendments to the *Competition Act* will not come into effect until March 13, 2010, companies have the ability to conduct a review of their existing agreements and other arrangements with their "competitors" and "other competitors".

- the degree of market concentration. The more concentrated the market, the more that the exchange of competitively sensitive information can be used to facilitate coordinated market conduct;
- the ease of entry by potential competitors or of expansion by existing competitors and whether entry or expansion is likely to occur on a sufficient scale to constrain the ability of the parties to the agreement to exercise market power in the relevant market; and
- whether any potential efficiencies are likely to be gained by the agreement to offset any lessening or prevention of competition.

Going Forward

As these amendments to the *Competition Act* will not come into effect until March 13, 2010, companies have the ability to conduct a review of their existing agreements and other arrangements with their "competitors" and "other competitors". As an added bonus, under the "Transitional Provisions" of the *Budget Implementation Act*, companies have the ability, for one year, to apply under section 124.1 of the *Competition Act* without the payment of a fee, for an opinion on the applicability to the agreement or arrangement of section 45 or 90.1.

Given that the most significant liability rests with the new criminal conspiracy provisions, a business will want to consider commencing its review by identifying any agreements or arrangements it has with competitors or potential competitors that deal with pricing, markets or output. These types of agreements should be examined closely to determine whether or not they violate, or could violate, the new criminal conspiracy provisions.

Exclusion of Liability Clauses

by Ben Aberant, Student-at-Law

In December 2008, the Supreme Court of Canada refused leave to appeal without reasons in *Selkirk Petroleum Products Ltd. v. Husky Oil Ltd*[1], allowing the decision of the Manitoba Court of Appeal[2] to stand. This case involved a dispute under a branded distributor agreement, a lubricants supply agreement and a product supply agreement, (collectively the "Agreement"). Two bulk fuel distributors, Prairie Petroleum Products and Selkirk Products (collectively the "Distributors"), had entered into the Agreement with Mohawk Oil Company ("Mohawk"). The Agreement required Mohawk to sell fuel products to the Distributors at the "Mohawk rack price" and also required the Distributors to provide Mohawk with at least two years notice of termination. The Mohawk rack price was not defined and no formula was provided for determining it.

After the Agreement was entered into, Husky Oil Ltd. ("Husky") purchased Mohawk and proceeded to unilaterally change the price being charged by switching to the "Husky rack price", which was a higher price. The Distributors paid the higher price for about two years; however, as a result of decreased sales, terminated the Agreement on the basis that by charging the higher "Husky rack price", Husky had unilaterally and fundamentally breached the Agreement. The Distributors sought damages for loss of business resulting from Husky's breach (the "Lost Business Damages"). Husky took the position that by virtue of an exclusion of liability clause ("Exclusion Clause") in the Agreement, Husky had no liability to the Distributors for the type of damages, namely the Lost Business Damages, claimed by the Distributors.

In the trial decision[3] the Court concluded that by charging the higher "Husky race price", Husky had committed a fundamental breach of the Agreement. Given the unequal bargaining positions of the parties, enforcement of the Exclusion Clause in the circumstances of the breach would lead to an unfair and unreasonable result.

The Manitoba Court of Appeal agreed that Husky had committed a fundamental breach of the Agreement. However, the Court of Appeal found that it would be neither unconscionable nor unreasonable to enforce the Exclusion Clause in this case. In terms of unconscionability, the Court of Appeal noted that both parties to the Agreement were advised by legal counsel and while there was a difference in the bargaining positions of the parties, there was no evidence of an abuse of bargaining power. In terms of reasonableness, the Court of Appeal relied on several factors including the fact that Husky had given the Distributors notice that the pricing formula would change. As well, the Distributors continued to deal with Husky for two years after the change until they gave notice of termination. Finally, Husky provided price support to the Distributors to help alleviate their concerns about the change, including in relation to business that was lost in reselling the fuel products at the higher Husky rack price. Based on these and other factors, the Court of Appeal was of the view that Husky was entitled to rely on the Exclusion Clause despite the fact that it had fundamentally breached the Agreement.

This decision should serve as a reminder to any party entering into an agreement that contains an exclusion of liability clause. A properly drafted exclusion of liability clause can very well mean that even in the face of one party to an agreement fundamentally breaching the agreement, that party may not be liable to the other party for lost business damages sustained as a result of the breach.

Footnotes

[1] Selkirk Petroleum Products Ltd. v. Husky Oil Ltd, [2008] S.C.C.A. No. 427

[2] Selkirk Petroleum Products Ltd. v. Husky Oil Ltd., 2008 MBCA 87

[3] Prairie Petroleum Products Ltd. v. Husky Oil Ltd., 2006 MBQB 92

When Is A Letter of Intent a Binding Contract?

by John Sanche, Summer Research Student

Introduction

In the law of contracts, a Letter of Intent ("LOI") by itself is generally not binding. However, in some circumstances, the courts may treat an LOI as a binding contract, despite the fact that the final contract has not been signed. The Ontario Court of Appeal case of *Wallace v. Allen("Wallace")*[1], decided in January 2009, is an example of such a situation. The interpretation of an LOI with respect to whether it forms a binding agreement is based on the construction of the LOI and on the conduct of the parties after the LOI is in place.

Facts in *Wallace v. Allen*

Graham Allen and Kim Wallace were friends and neighbours. In August 2004, Allen told Wallace that he wanted to sell his business and retire. The business was Region of Huronia Environmental Services Limited ("Huronia"), which comprised four companies. Wallace was interested in purchasing the business, and the parties began negotiating an agreement. During the negotiation period, Wallace drafted two Letters of Intent, both of which Allen rejected on the basis that "there remained too many things up in the air"[2]. At the conclusion of negotiations on September 24, 2004, a third LOI had been drafted, and both parties acknowledged that it captured all of the essential terms of the transaction. Both parties signed that LOI.

Following the drafting of the LOI, both parties treated the agreement as binding. Wallace had previously told Allen he would not work at the business prior to the transfer of ownership, without a binding agreement. On September 27, 2004 Wallace began working at the business daily in preparation for assuming ownership, indicating by conduct that he believed a binding agreement was in place. Less than two weeks after signing the LOI, a Huronia employee meeting was held where Allen announced his retirement, that he had "sold" the business to Wallace, and that Wallace would be the new owner. In November 2004, at the company Christmas party, Wallace was introduced as the "new owner" and he gave a speech.

On December 9, 2004, Wallace and Allen began meetings to finalize the terms of the Share Purchase Agreement. The parties agreed that all outstanding issues had been resolved by December 16, 2004. The target closing date was set as December 29, 2004 and on that day, Allen and his solicitor were prepared to close the transaction, but Wallace was not present. The evidence showed that Wallace had gone to Florida to be with his family, and that Allen was aware of the trip, and, in fact, had encouraged it. When Wallace did not appear at the closing, Allen treated the transaction as at an end and refused to consider alternative closing dates. Wallace attempted repeatedly in the following days to complete the transaction, but Allen refused. After the failure of the deal, Wallace brought an action in breach of contract.

The Issue

The issue in question was whether an LOI that anticipates a future formal agreement can itself form a binding, enforceable agreement.

The Law

A 2007 Alberta case, *A. Valin Petroleums Ltd. v. Imperial Oil Ltd. ("Valin")*[3], summarized the law in on this issue, contrasting the two possible interpretations of an LOI in this type of situation: the Letter could either constitute a binding agreement, or a mere agreement to agree. Justice Clark, in *Valin*, cited the leading Supreme Court of Canada decision in this area, *Calvan Consolidated Oil & Gas Co. v. Manning*[4], in which the Court found an LOI to be binding where the acceptance was unconditional, and all that was left for the parties to do was to "embody the precise terms" of the informal agreement into a formal agreement. Where an LOI is "subject to the preparation and approval of a formal contract", or something similar, then it is unenforceable, because it is only an agreement to agree—that is, the essential terms of the agreement have not been set out at the time the agreement is entered into[5].

The conduct of the parties is also very important in determining whether an LOI forms a binding agreement. In *Valin*, the LOI was found to constitute a binding contract because in addition to containing all of the essential terms of the agreement, it was signed by both parties, it created obligations for both parties and both parties had begun performance under it[6].

Deciding Factors in *Wallace v. Allen*

The Court of Appeal ruled that when read as a whole, the LOI was evidence that the parties intended to be bound. In particular, there were two clauses in the LOI that strongly indicated an intention to be bound: one indicated that the wording of the agreement stated in the Letter might change somewhat in the formal agreement, and the second stated a time limit within which the LOI had to be reduced into an agreement of purchase and sale by the parties. The crucial aspect of those clauses was that they indicated that the substance of the agreement in the LOI was already considered to be complete and binding by the parties, and all that remained was for the wording to be set out in a more formal document. Furthermore, the fact that Allen refused to sign earlier drafts of the LOI, but signed the September 24, 2004 LOI, indicated his satisfaction with that LOI and his intention to be bound by its terms.

Mr. Justice MacFarland also found that the conduct of the parties after they signed the LOI was a clear indication of their mutual intention to be legally bound by it. Wallace worked in the business on a full time basis until December 22, 2004 when he left for Florida. He made efforts to involve his son and a friend of his in the business. Allen, at least twice, publicly announced his retirement and introduced Wallace as the new owner. Wallace sent funds to his solicitor for closing. Allen showed up on the closing date, ready to sign the Share Purchase Agreement. All of those actions were consistent with both parties believing they were bound by the LOI agreement.

The Court of Appeal awarded Wallace seven months of business earnings in damages ($560,000) being the time the Court of Appeal determined it would take a businessman to search out and find another opportunity, negotiate an agreement and close the transaction.

Update on *Klemke Mining Corp. v. Shell Canada Ltd*

The *Klemke Mining Corp. v. Shell Canada Ltd.*[7] ("*Klemke*") case was discussed in the June 2007 issue of BD&P's On Record Energy Matters, in the article *When Negotiations Become a Contract: Perhaps Sooner Than You'd Think.* At that point, the case was an Alberta Queen's Bench decision. In July 2008, the Alberta Court of Appeal upheld the trial decision. *Wallace* is consistent with that decision. In fact, *Wallace* is a more straightforward case than *Klemke*. The LOI in *Wallace* contained all of the essential terms of the agreement, both parties considered themselves bound to the agreement and had acted accordingly, the agreement had been formalized, and money had been set aside for closing. The formal agreement fell apart only at the actual closing meeting, due to Wallace's absence and Allen's refusal to close after that original meeting. By contrast, in *Klemke* the parties disagreed on whether the agreement was complete and sufficiently clear at the point in time the Court determined an enforceable agreement did exist.

Concluding Thoughts

An LOI can be found to be a binding contractual agreement, if its construction is such that it includes all of the essential terms of an agreement, and all that remains is for the agreement to be set out in a formal document. An LOI may even be considered binding if some aspects of the agreement are not fully set out, but there is a mechanism in place—arbitration, for instance—whereby those aspects can be determined at a later date. The more uncertainty there is in an LOI agreement, however, the less likely it is that the agreement will be found to be binding. The conduct of the parties in relation to the LOI is also very important. If the parties act as if they are bound by the agreement in the LOI, then the courts will likely see it that way too.

Footnotes

[1] 2009 ONCA 36.
[2] ibid, at para. 12.
[3] 2007 ABQB 134
[4] [1959] S.C.R. 253
[5] Ibid at para.13
[6] Supra, note 3, at para. 30.
[7] 2008 ABCA 257

Honouring the Right of First Refusal

by Sylvie Welsh, Summer Research Student

Introduction

Package sales, being multi-property transactions, are common in the Canadian oil and gas industry. In these transactions, the vendor will sell a number of separate parcels under one package. The recent Queen's Bench decision of *Bearspaw Petroleum Ltd. v. ConocoPhillips Western Canada Partnership*[1] *("Bearspaw")* involved a package sale that included certain petroleum and natural gas properties as well as jointly owned oil and gas properties over which the right of first refusal (ROFR) applied.

What are ROFRs?

The general purpose of ROFRs in the context of jointly owned oil and gas properties is well understood The Ontario Court of Justice (General Division) in *GATX Corp v. Hawker Siddeley Canada Inc. ("GATX")*[2] stated that generally the idea of ROFR is to prevent a party from being forced into an unwanted joint ownership with a third party since that party has the pre-emptive right to acquire the shares first, on the same terms and conditions as being offered to the third party. In other words, ROFRs provide some control to a joint owner with respect to the parties with whom it does business.

When dealing with package sales of oil and gas properties, ROFRs can become complicated as many issues arise with respect to vendor's obligations (including obligations of good faith to the ROFR holder), purchaser's obligations and purchase price.

Facts In Bearspaw

Bearspaw Petroleum Ltd. ("Bearspaw Petroleum") and ConocoPhillips Partnership ("CP Partnership") or their predecessors owned properties in common under agreements that provided joint rights in petroleum and natural gas interests. The operating agreements between these two

parties granted ROFRs to Bearspaw requiring CP Partnership to provide notice to Bearspaw if it wanted to assign, sell or dispose of the lands ("ROFR lands").

In summer 2006, CP Partnership marketed a package sale incorporating certain petroleum and natural gas properties as well as the ROFR lands. In fall 2006, Pengrowth Corporation ("Pengrowth") was the successful bidder of the package sale for the sum of approximately $1 billion with the sale effective on November 1, 2006. This transaction was accomplished by a share purchase sale where CP Partnership conveyed assets to four of its subsidiary corporations, and Pengrowth then purchased the shares from the subsidiaries.

CP Partnership issued Notices of Disposition of Interest to Bearspaw. These notices did not refer to Bearspaw's ROFR rights as CP Partnership was of the view that the disposition occurred between affiliate companies and therefore was an exception to the ROFR rights. This resulted in the issuance of the Statement of Claim whereby Bearspaw sought an order against Pengrowth to either set aside the transfer or assignments, or provide Bearspaw with ROFR notices in accordance with the agreements.

In January 2008, in an attempt to limit its litigation exposure, Pengrowth sent Bearspaw a "business settlement proposal" ("the proposal") in the form of a ROFR notice. Pengrowth presented the proposal to provide business certainty but nowhere did it admit that Bearspaw was entitled to a ROFR notice. The proposal also included the purchase price for the ROFR lands that Pengrowth had determined in late 2007, after the sale between Pengrowth and CP Partnership had occurred.

Bearspaw filed a Notice of Motion in the proceedings requesting the disclosure of valuation information from Pengrowth and Pengrowth cross-applied for summary dismissal on the basis that a ROFR notice was provided. A summary dismissal application, if successful, effectively ends the litigation and it is only awarded if the applicant, Pengrowth in this case, establishes that the matter has virtually no chance of succeeding at trial. Pengrowth argued that the onus was on Bearspaw to prove that Pengrowth had not acted in good faith in setting the purchase price and no such evidence had been provided such that the action had no reasonable prospect of success.

Relevant Case Law

Master Hanebury referred to several leading cases in her decision, setting out some guiding principles in this area of law.

1. A basic tenet with respect to ROFRs was laid out in *GATX* – that one cannot do indirectly what one cannot do directly. When specifically looking at the obligation of a vendor in the context of package sale, *GATX* has also become known for the proposition that a grantor of a ROFR must act in good faith and reasonably with respect to the ROFR and must not act in such a way as to deny the very right which has been granted.

2. In *Apex Corp. v. Ceco Developments Ltd. ("Apex")*[3] the Alberta Court of Appeal stated that a package sale will trigger ROFR rights regardless of whether the ROFR agreement contemplates such a sale. This decision highlights the role of the courts in upholding such agreements between parties and trying to make the agreements work. Master Hanebury acknowledged that *Apex* reinforced that a package sale should not defeat the purpose of a ROFR.[4]

3. The obligation on a grantor of ROFR was further considered in *Chase Manhattan Bank of Canada v. Sunoma Energy Corp ("Chase")*[5], which looked specifically at pricing of a ROFR within a package sale. Normally, the vendor has the contractual obligation of determining the purchase price applicable to the ROFR encumbered properties. However, designating such a price to ROFR lands in a package sale becomes difficult as there is no clearly defined purchase price to refer to and the interests of the vendor, purchaser and ROFR holder are not easily reconciled. The Alberta Court of Queen's Bench, in *Chase*[6], determined that in a package sale, while a departure from the usual practice, the vendor can rely on the purchaser to determine the purchase price of the ROFR lands. The ROFR holder would have the burden of proving that the other parties breached their duty of good faith in allocating value. The Alberta Court of Appeal, in *Chase,* noted that while the vendor owed a duty of good faith, the third party purchaser may not owe such a duty to the ROFR holder since there is no privity of contract between the third party purchaser and ROFR holder.

4. Furthermore, the Court of Appeal in *Chase*, highlighted that when a ROFR holder challenges the issuance of proper ROFR notices, it must establish that the purchase price designated to the ROFR lands is not a *bona fide* estimate of their value. The ROFR holder must do more than simply argue that the allocated purchase price does not represent fair market value or that the purchaser refused to reveal valuation information. Essentially the ROFR holder must show that the duty of good faith was breached.

The Decision in Bearspaw and Concluding Thoughts

Master Hanebury found the evidence insufficient to determine that Pengrowth's settlement offer was in line with what would have been offered had this ROFR been provided at the time of the sale by CP Partnership. Accordingly the summary dismissal application of Pengrowth failed and the matter will likely proceed to trial.

Nigel Bankes indicates that the significance of this case as a matter of principle relates to two questions.[7] One is the scope of the vendor's good faith duty to make sure that the ROFR holder's rights are not rendered meaningless and the question of an appropriate mechanism to make this happen when there is a disconnect between the vendor (the party owing the duty) and the purchaser (the party providing the valuation).

We will report further in a subsequent *On Record Energy Matters* Newsletter. However, in the meantime, it is clear that the issues surrounding the treatment of the ROFR holder, including issues of valuation and good faith, will not simply be swept under the carpet.

Foonotes

[1] 2009 ABQB 202
[2] [1996] O.J. No. 1462
[3] 2008 ABCA 125
[4] Supra, note 1, at para. 39
[5] 2002 ABCA 286
[6] [2001] A.J. No. 245
[7] Nigel Bankes, University of Calgary Faculty of Law Blog on Developments in Alberta Law, online: http://ablawg.ca/author/nbankes/

DIRECTIVE 074:

The ERCB Moves Towards More Stringent Tailings Pond Management

by Simon J. Lee, LLB, P. Eng.

New Directive

On February 3, 2009 the Energy Resources Conservation Board (ERCB) issued Directive 074: *Tailings Performance Criteria and Requirements for Oil Sands Mining Schemes*. This Directive regulates the operation of oil sand mine tailings ponds. It specifies certain performance criteria that operators must meet with respect to treating and disposing of tailings and also provides enforcement actions if these criteria are not met.

Tailings Ponds

During the oil sands extraction process, bitumen-containing rocks are crushed and washed to extract the bitumen. Tailings are the by-product of this process and consist of a slurry of water, residual bitumen not removed during processing, other process chemicals and a mixture of sand, silt and clay. This slurry is usually placed in large tailings ponds at the mine site, the ponds often formed by constructing dams to impound the tailings in natural topographic depressions. The rock particles are left to settle to the bottom of the pond, and the remaining water (which is often contaminated with bitumen and other process chemicals) is decanted off, treated and either reused or disposed. The ERCB estimates that 720 million cubic meters of fluid and fine tailings are presently stored in ponds in Alberta.

Tailings facilities have been in the news recently, for reasons including the announcement in early February of charges being laid against Syncrude Canada under the *Alberta Environmental Protection and Enhancement Act* and the *Federal Migratory Birds Convention Act*. These charges relate to some 500 duck mortalities after a flock landed on a Syncrude Canada tailings pond at its Aurora mine site in April 2008. The large area typically occupied by tailings ponds in addition to the t unsightly nature of the ponds have made them a favourite target of activists opposing oil sands development.

Regulatory Framework

As with many aspects of the oil sands industry, the legal framework for the development, operation and closure of tailings facilities is complex. However, the ERCB is the lead regulatory authority pursuant to the *Oil Sands Conservation Regulations* and is primarily responsible for issuing approvals for storing waste products generated by a mine. Additionally, Alberta Environment (AENV) and Alberta Sustainable Resource Development (SRD) regulate some environmental and landuse aspects of tailings operation including pollution prevention, water use and reclamation.

Requirements of New Directive

Directive 074 contains two new broad requirements that operators of tailings ponds must meet. Firstly, the operator must create "Dedicated Disposal Areas" (DDAs) for the fine sediments which are removed from the fluid tailings waste, collected and disposed. Secondly, the Directive imposes a legal requirement on the operator to submit a detailed tailings management plan as part of annual reports mine plans required by the Oil Sands Conservation Regulation.

i. Dedicated Disposal Areas

Directive 074 requires the construction of DDAs to contain the fine rock component of tailings. Operators must submit a plan for each DDA that includes information about the engineering design and operation of the DDA, timelines for construction, operation, closure and capping of the DDA, and a post-reclamation final landform design. Predictions on performance of the DDAs must also be provided. This plan is subject to regulatory review by the ERCB, AENV and SRD and ultimately approval by the ERCB. The Directive also contains performance criteria specifying the amount of fine material that must be removed from the waste stream as a percentage of fine material in the raw ore prior to processing. Operators are expected to capture 50% of the fine material from the ore in DDAs by July 1, 2012. Note that this is a "performance criteria", which does not compel operators to implement a particular method as long as the criterion is ultimately met.

ii. Reporting Requirements

The Directive also imposes new quarterly and annual reporting requirements, where operators must report compliance (or otherwise) with respect to the performance criteria. Additionally, the Directive specifies certain trafficability requirements for the deposited tailings. A primary environmental concern with tailings ponds is to ensure that as they approach closure and reclamation, they are "trafficable". This means that all water has been removed from the pond and the sediments and fine materials have consolidated to form a hard surface on which vehicles can operate. This provides a firm base on which further reclamation can be conducted, including revegetation and the development of new land uses. Under the new Directive, the tailings must have a strength of 5 kilopascals one year after deposition and 10 kilopascals five years after closure of the DDA. These criteria require the surface of the tailings to be approximately similar to an extremely soft, wet clayey soil which would only marginally support a person's weight, so even if the criteria is met, substantial work will still be required to stabilise and reclaim the areas.

Section 30 of the *Oil Sands Conservation Regulation* requires that each operator produces a detailed annual mine management plan addressing all aspects of operations. The new Directive 074 requires that a Tailings Management Plan also be included in the mine management plan. The Tailings Management Plan must contain a significant amount of information about the operation of the DDAs and other fluid tailings ponds (the ponds where tailings and liquids not otherwise captured in the DDAs are stored). This information includes estimates of the volumes of tailings to be produced during the life of the mine, disposal plans for the tailings, operational schedules and estimates of water seepage from the ponds into the surrounding groundwater. Annual status reports concerning the monitoring and development of fluid tailings ponds must now also be submitted.

Compliance

Compliance with *Directive 074* is enforced by the provisions of *Directive 019: ERCB Compliance Assurance – Enforcement.* This Directive uses a risk-based approach to assess the severity of non-compliance and the ERCB can impose a series of escalating penalties on non-compliant operators. Ultimate legal sanctions include the imposition of "non-compliance fees" (essentially fines), suspension or cancellation of permits, licenses and approvals, suspension of operations or the imposition of "global refer" status on an operator. In this case all the operator's applications to the ERCB are not routinely processed and instead are automatically brought before the ERCB for hearing and disposition.

Concluding Thoughts

The effectiveness and efficiency of *Directive 074* remains to be seen. At the time of writing, operators were still reviewing the implications of the new Directive. Certainly, it will take industry, regulatory specialists and engineers time to digest the implications of the Directive and determine the exact requirements of the various reports mandated by the ERCB. Initial reaction from environmental groups was predictably cool, with one group pointing out that the new Directive did not address legacy issues associated with existing tailings ponds.

Directive 074 is the first in a series of directives to be issued by the ERCB that, in time, will form a comprehensive legal framework for managing all aspects of tailings ponds in the oil sands industry. Industry will need to digest and address the requirements of the new regulatory regime and as always, it may be some time before the full implications of the new Directive are known.

Put the Boots to Hunger

BD&P is excited about the recent launch of its joint Stampede-themed fund and food raising campaign with the Calgary Inter-Faith Food Bank — that of "PUT THE BOOTS TO HUNGER". In light of Calgary's not-for-profit sector finding the current economic times extremely challenging — both financially and through sustainable volunteer support — BD&P decided commit $150,000 to launch and promote the initiative during Stampede week, 2009.

The overall goal of the PUT THE BOOTS TO HUNGER campaign in 2009 is to raise at least $500,000.

BD&P hopes that the PUT THE BOOTS TO HUNGER campaign will provide the opportunity to witness the true "Stampede Spirit" of community support. The proposed elements of the PUT THE BOOTS TO HUNGER initiative offers the Calgary Food Bank a unique and valuable opportunity to raise awareness in our community and to inspire individuals, community groups and corporations to support BD&P in achieving this goal — "to provide quality, emergency food to those in need".

If the demand for the Calgary Food Bank's services continues as it did during the fall of 2008 and in early 2009, the Food Bank will experience its largest need for emergency food hampers in nearly 10 years. The majority of people relying on the Food Bank for emergency food hampers continue to be the working poor. It is our goal to provide the Calgary Food Bank with the resources it needs to ensure that all Calgarians who need to rely on the Calgary Food Bank can do so.

For more information on how to participate in the Campaign, please visit **www.puttheboootstohunger.com**

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