

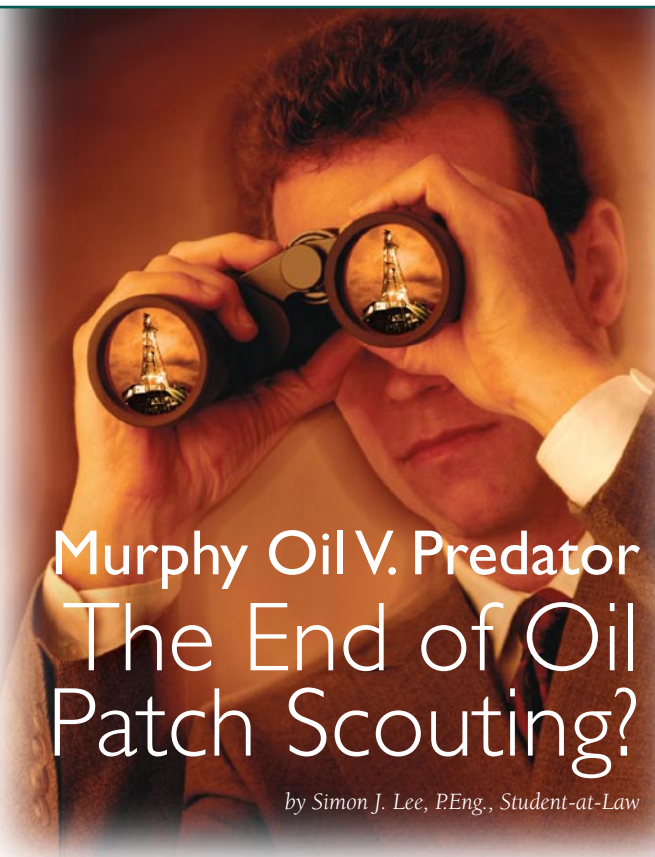


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# ENERGY

M A T T E R S

JANUARY 2007



## Murphy Oil V. Predator The End of Oil Patch Scouting?

by Simon J. Lee, P.Eng., Student-at-Law

### INTRODUCTION

“Scouting” is a common practice in the oil industry. The term describes the various activities by which companies or individuals attempt to obtain commercially sensitive information about the success (or otherwise) of another company’s wildcat drilling in a certain area. If a company knows that another company’s well has struck a promising play, it can attempt to buy up surrounding land without the risk and expense of drilling a well themselves.

Scouting activities often involve one or more of the following:

- conducting covert or overt surveillance of drilling activities at a rig site. An experienced scout can deduce much about the success of the well simply by surface activities on a lease. For example, extended testing and flaring activities at a depth believed to have reservoir potential is often an indication that the well has located economic reserves. Similarly, the mere presence of a service company on a lease may provide important commercial information. For instance, the presence on site of a company specialising in sour gas safety indicates the well may contain H2S;
- approaching drilling personnel and attempting to get them to reveal the results of drilling and testing activities. This is often done in a social context ranging from a local bar to lunch at the Petroleum Club;

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- ▶ attempting to get stock promoters to unlawfully reveal undisclosed results of drilling prior to public disclosure;
- ▶ monitoring cell phone or radio transmissions to and from the site; and
- ▶ contacting contractors who worked on the site to attempt to get them to divulge the results of their work.

However, the recent case of *Murphy Oil Company Ltd. v. Predator Corporation Ltd.*<sup>1</sup> (“Murphy Oil”) would suggest caution in the activities that scouts often perform.

## HISTORY OF EVENTS

In *Murphy Oil*, the defendant Predator Corporation (“Predator”) was interested in the gas exploration drilling activities of Murphy Oil Co. Ltd. (“Murphy”) in northeastern BC<sup>2</sup>. As part of its scouting activities, Predator contacted the third party contractor who had conducted pressure testing in Murphy’s exploration well. Surprisingly, the contractor was persuaded to provide Predator with the confidential results of the testing that it had carried out for Murphy. The use of this information allowed Predator to outbid Murphy in the auction of oil and gas rights in surrounding land without first bearing the cost or risk of exploring.

Murphy subsequently discovered what had happened and sued Predator for breach of confidence due to their use of the test results<sup>3</sup>. Amongst many arguments, Predator attempted to argue that scouting was a well-established, widely practiced activity in the oil industry, and short of outright illegal acts, anything was permissible.

Justice Nation of the Alberta Court of Queen’s Bench disagreed with Predator and found its use of the test data unlawful. In doing so, she applied the three-stage common law test developed by the Supreme Court of Canada in *Lac Minerals v. International Corona Resources Ltd.*<sup>4</sup> (“*Lac Minerals*”) to determine whether a breach of confidence occurred when Predator used the test data.

Importantly, the court found that a breach of confidence is possible even if the party using the information has done nothing unlawful to obtain it and received it from an intermediary who freely and voluntarily provided the information. This is because the quality of ‘confidentiality’ attaches to the information itself, irrespective of who conveys the information.

Additionally, the court rejected the argument made by Predator that scouting was simply accepted oilfield practice, explicitly stating at p.22, “there is no reason unique to the industry... to explain why the concept of breach of confidence should not be applied to this situation, or to suggest that the concept of breach of confidence should be inapplicable to scouting”. The court simply applied the test in *Lac Minerals* to determine whether a breach occurred. In response to the suggestion that there were policy considerations in that this decision might affect the unique style of business in the oil patch (i.e. the hidden agenda of a lunch at the Pete Club being to glean information from an unsuspecting employee or executive who might inadvertently, while promoting stock or boasting of success, give up otherwise confidential information) Justice Nation stated

that those considerations had to be dealt with on a case by case basis. She went on to say that it would be preferable for the industry to be self-regulating, developing rules that are endorsed and practised by its members. However, in the absence of clear custom in the industry and where participants behave in a way that conflict with well-established legal principles, Justice Nation reminded the industry that appropriate remedies will flow.

### THE LEGAL TEST FOR BREACH OF CONFIDENCE

The three-stage legal test for breach of confidence as set out in *Lac Minerals* (at p.10) is as follows:

- 1) the information must have ‘a quality of confidence’ about it;
- 2) the information must be communicated in circumstances in which an obligation of confidence arose;
- 3) the information must subsequently be misused or used in an unauthorised manner.

To determine whether the information has a “quality of confidence” about it as required by the first stage of the test, a court will consider a number of factors which were described in *Pharand Ski Corp. v. Alberta (“Pharand”)*:

- the extent to which the information is known outside the owner’s business;
- the extent to which it is known by employees and others involved in the owner’s business;
- the extent of measures taken by the owner to guard the secrecy of the information;
- the value of the information to the owner and his competitors;
- the amount of money or effort expended by the owner in developing the information; and
- the ease or difficulty with which the information could be properly acquired or duplicated by others.

Based on the above factors, the Court in *Murphy Oil* found that the test results on a well with “tight hole” status were clearly confidential information.

Next, the court found that Predator knew (or should have known) that the information was the confidential property of Murphy and that the information had been communicated in confidence. Therefore, the second stage of the *Lac Minerals* test was met.

Finally, the Court determined that there was clearly a misuse of the information obtained, as the information allowed Predator to obtain the rights to offset lands which otherwise would have been purchased by Murphy.

In summary, the Court found a breach of confidence on the part of Predator when it used Murphy’s confidential well test data. The Court imposed the remedy of constructive trust on Predator, i.e. it declared that Predator did not own the oil and gas rights to the offset lands but simply held them in trust for Murphy and was required to reconvey them to Murphy.

### IMPLICATIONS FOR THE PRACTICE OF SCOUTING

While on the facts of this case, the direct interaction between an engineer at Predator and the contractor was not “scouting”, the case has serious implications for the practice of scouting. The Court was clearly of the view that scouting cannot simply be justified as ‘a standard oil field practice’ in which ‘anything goes’. The Court found no reason why the concept of breach of confidence should be inapplicable to scouting. Hence, all scouting activities are susceptible to being assessed in light of the three-stage test set out in *Lac Minerals* and many activities traditionally carried out by scouts may well now be unlawful. For instance, information obtained during an ‘off-the-record’ conversation with drilling personnel in a bar cannot lawfully be used if the circumstances meet the three-stage test outlined above. Similarly, a contractor releasing confidential information to a third party is clearly unlawful.

Other laws also apply to restrict the activities a scout can lawfully undertake. For instance, the possession or use of devices that intercept electronic communications such as cell phone calls is a criminal offence in Canada, punishable by up to five years imprisonment. Similarly, trespassing on private land without permission constitutes trespass and is therefore also unlawful.

While each situation should be assessed on its own facts, it would appear that following

the decision in *Murphy Oil*, one of the few activities a scout can legally undertake with certainty is to visually observe drilling activities from public land.

### CONCLUSIONS

As noted above, the decision in *Murphy Oil* clearly affects the activity of oil patch scouting and companies should consider all the circumstances before using information so obtained.

One final important point should also be considered. Most oil companies have developed corporate codes of responsible business practices and ethics that dictate the standards to which they will operate. Quite apart from whether scouting is strictly legal, scouting may well breach a company’s code of ethics or similar corporate policies. In this case, companies should always be aware of how their own internal policies may affect how they obtain and use commercially sensitive information.

### Footnotes

<sup>1</sup> 2006 ABQB 680 (Q.B.)

<sup>2</sup> For the purposes of this discussion, the facts are simplified somewhat.

<sup>3</sup> The contractor responsible for releasing the confidential results to Predator agreed to co-operate with Murphy and testify at trial in exchange for an agreement by Murphy not to take action against it for divulging the results.

<sup>4</sup> [1989] 2 S.C.R. 574

<sup>5</sup> (1991), 80 Alta. L.R. (2d)216 (Q.B.)

<sup>6</sup> See sections 184 and 191 of the Criminal Code of Canada

# Indemnity Provisions

## Are They Doing Their Job?

by Alicia K. Quesnel and W. Kent Breedlove, Student-at-Law

### INTRODUCTION

The recent Alberta case of *Anadarko Canada Corp. v. Canadian Natural Resources Ltd.* 2006 ABQB 590 considered the indemnity provisions in an Agreement of Purchase and Sale of certain upstream petroleum and natural gas assets (the “Agreement”) to determine whether the vendor was responsible for the costs of the remediation of an abandoned battery site on the relevant lands.

### FACTS

In 1995, Canadian Natural Resource Limited (“CNRL”) purchased oil and gas assets from Norcen Energy Resources Limited, a predecessor of Anadarko Canada Corporation (“Anadarko”). The purchase included leased lands upon which an oil battery had been constructed in 1952. In 1963, the battery was abandoned by Anadarko’s predecessor and the lands were reclaimed. The reclamation was completed and in 1968 the Province issued a reclamation certificate over the battery. The licence of the battery was not assigned to CNRL and Anadarko remained the registered holder of the licence. There were no stated issues with the battery between 1968 and 1998, when Anadarko received notice from the Alberta Environmental Protection Agency requiring Anadarko, as the licence holder of the former battery, to remediate the site where the former battery stood. Remediation was to repair damage caused by salt water and hydrocarbon contamination associated with the battery. At the time at trial, the cost associated with remediating this abandoned battery was \$437,120.51 and the future estimated cost for remediation was over \$3.2 million.

### ISSUE

The issue was whether Anadarko, as the battery licence holder, or CNRL, as the new owner of the property, was responsible for the environmental clean-up surrounding the abandoned battery site. This of course turned on the Indemnity obligations of

CNRL at the time of the Agreement, of which there were three—a General Indemnity, an Abandonment and Reclamation Indemnity and an Environmental Matters Indemnity.

### ANALYSIS

#### i) Environmental Matters Indemnity

The Court examined all three of the indemnity provisions in the Agreement, determining that Article 6.3, the Environmental Matters Indemnity, was the starting point for the examination. As the purchaser, CNRL had agreed that it would indemnify Anadarko for any environmental damage or contamination or other environmental problems “pertaining to the Assets or to any well located on the Lands”. Turning to the definition of “Assets”, which included “Petroleum Natural Gas Rights, the Tangibles and the Miscellaneous Interests”, the Court found that the abandoned battery facility was not included in any of these defined terms. While the definition of “Tangibles” included “oil batteries”, Madame Justice Rowbotham held that the common sense view of “Tangibles” was that it would include existing oil batteries, not batteries that were abandoned, removed and no longer in existence. Furthermore, the Court found the strongest argument in CNRL’s favour was the language that followed Assets, namely “or to any well located on the lands”. The court determined that these words meant that the drafter of this indemnity clause considered other environmental problems,

which might be related to items outside of what was defined as Assets. Since the drafter turned his or her mind to the inclusion of words that did not pertain to the Assets, then the failure to include abandoned facilities on the lands was purposeful. As a result, the Court found that Article 6.3, the Environmental Matters Indemnity, did not cover the environmental remediation demanded by this abandoned well battery.

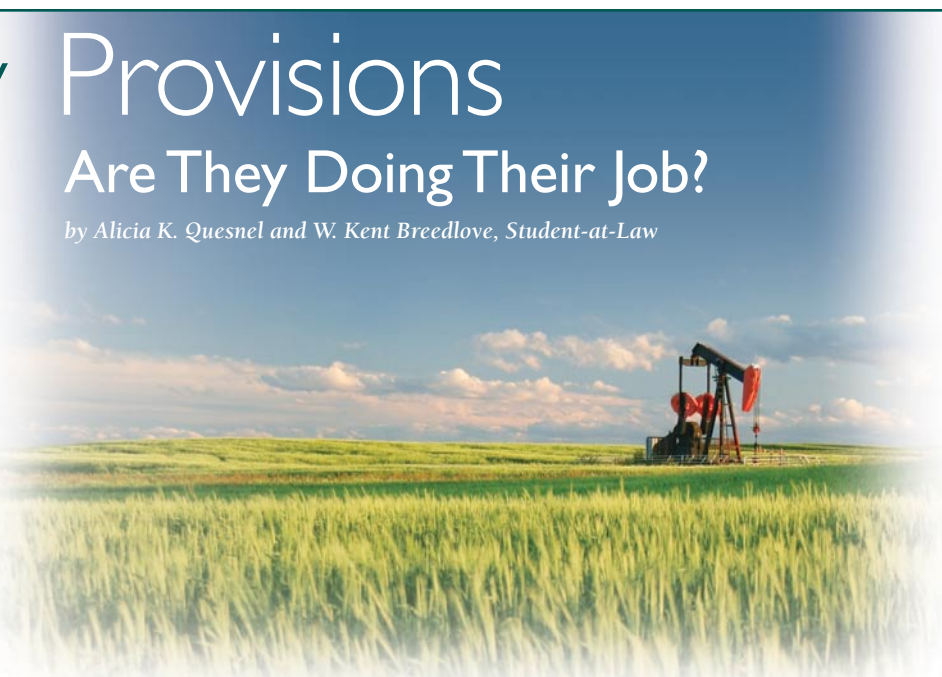
#### ii) Abandonment and Reclamation Indemnity

The Abandonment and Reclamation indemnity provisions in Article 6.2 required CNRL “to see to the timely performance of all abandonment and reclamation obligations pertaining to the Assets”. Given Madame Justice Rowbotham’s previous finding that the abandoned battery was not an “Asset”, nor did it pertain to an Asset; it was the Court’s conclusion that this indemnity clause had no application in the circumstances.

#### iii) General Indemnity

The General Indemnity provision found in Article 6.1 of the Agreement read as follows:

“the purchaser is required to indemnify the vendor from losses which it may sustain by reason of any matter arising out of, resulting from, attributable to, or connected with the Assets and occurring or accruing after the effective date”.



While Anadarko relied on this provision as its principle argument, the Court found that the type of damage for which the indemnity was being sought was environmental which type of damage was contemplated in both Articles 6.2 and 6.3. According to Madam Justice Rowbotham, one would think that any obligation on the part of CNRL would arise from either of those two Articles. She found that the General Indemnity clause was meant as “a catch all for other losses” such as a personal injury claim.

Moreover, the Court found that the type of loss being claimed here was not a loss that had occurred after the effective date or after the date which CNRL had purchased the Asset. The loss

here was from a much earlier time, namely the 1950s and the 1960s. The Court found that since the abandoned battery site contained no physical objects or Assets and because the damage occurred in the 1950s or the 1960s, there was nothing to which the general indemnity provision could be applied.

#### CONCLUSION

The litigation regarding the indemnity provisions under the Agreement between CNRL and Anadarko highlights the fact that the “standard” environmental indemnity clauses in most purchase and sale agreements, like the one in this case, do not specifically address the allocation of liabilities for

previously abandoned facilities (and many do not specifically address previously abandoned wells). This has been likely due, in part, to a failure of vendors and purchasers to turn their minds to the issue, and, in part, to the inability of the vendor and the purchaser to agree on how these potential liabilities should be allocated. As a result of this case, however, the failure to specifically address the question now means that the vendor likely retains these liabilities. It will be interesting to see how industry responds to this case and whether these types of liabilities will, as a matter of course, remain with the vendor or whether they will become environmental liabilities typically assumed by the purchaser.

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# Employer-Sponsored Scholarship Plans: Taxable Benefit?

by Michel H. Bourque

Many employers set up and sponsor scholarship plans to recognize the scholastic achievement of dependent children of their employees and to encourage those children to proceed to post-secondary education in approved universities and colleges. Under the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, scholarships are generally taxed in the hands of the student receiving such an award. Prior to the 2000 taxation year, the amount of a scholarship that exceeded \$500, and since 2000, the amount that exceeded \$3000, was included in the student's income. A change was introduced in the Federal Budget tabled on May 2, 2006, to the effect that the entire amount of the scholarship will be exempt starting with the 2006 taxation year. The Minister of Finance stated that this measure, among others, was for the purpose of supporting a more skilled and educated workforce. The Minister's goal is laudable, except that the tax collection arm of the federal government, Canada Revenue Agency (“CRA”), has taken an aggressive assessing position in recent employer benefits' audits, particularly in the case of employer-sponsored scholarship plans.

The CRA's theory is that a scholarship plan is part of the overall negotiated compensation package between the employer and its employees. As such, the amount of the scholarship is an employment benefit in the same vein as a myriad of benefits, such as pension entitlements, medical and dental plans and fitness subsidies. Under

this scenario, the CRA takes the position that the amount of the scholarship is to be included in the employee's income at the parent's highest marginal rate (as opposed to inclusion in the student's income) and does not accept that the scholarship exemption is available to either the parent or the student.

The following example illustrates the significant impact of the CRA's position. Mrs. Smith is employed with Oilco Ltd. and earns \$80,000 per year. Mrs. Smith's daughter, Amanda, is enrolled at the University of Calgary in a degree program. Oilco Ltd. has an employer-sponsored scholarship plan under which Amanda receives \$4,000 as a scholarship. Amanda has other income of \$10,000 in the year. Under the CRA's theory, Mrs. Smith must include \$4,000 in income and pays income tax of \$1,440 in Alberta (assuming a 36% marginal tax rate), while Amanda, for years prior to 2006, would have included \$1,000 in income (as the first \$3,000 would be exempt) and would pay income tax of \$260 (assuming a 25% marginal tax rate). In 2006, Amanda, would not include any amount in income as a result of the recent exemption provision. Thus, in this scenario, the CRA will increase its own revenues by \$1,440. On the assumption that 25,000 Canadian taxpayers are in circumstances similar to Mrs. Smith and Amanda's, the CRA's assessing position results in an additional \$36,000,000 in tax revenue.

We are aware of a matter proceeding to trial in the Tax Court of Canada in Spring 2007 and a further update will be provided at that time.



# Water and the Oilsands

by Patricia Quinton Campbell, Kevin J. Tuohy and Ben Aberant, Summer Research Student

## USE OF WATER IN EXTRACTION PROCESS

With 23% of the province made up of oilsands deposits and an estimated 149 square kilometres of boreal forest, the oilsands represent the future lifeblood of Alberta<sup>1</sup>. However, extraction of this lucrative natural resource does not come without problems<sup>2</sup>. While open-pit mining has its own significant water issue, it is estimated that approximately 80% of the oilsands in Alberta are located too far below the surface for traditional open-pit mining techniques<sup>3</sup>. The result has been the development of *in situ* technologies such as Steam Assisted Gravity Drainage (SAGD). SAGD involves the injection of massive amounts of steam working alongside traditional oil well technology. SAGD requires incredibly large quantities of water for the extraction of bitumen, in addition to the energy required to boil the water to produce the steam. While much of the water converted to steam is recycled, some is lost and further water is required to make up that loss. In addition, SAGD creates a wastewater disposal problem and potential environmental

degradation below the surface. It takes two to five barrels of water to produce one barrel of oil.<sup>4</sup> There is no doubt that in order to continue with and enhance production that requires such water use, industry participants will require a detailed understanding of the regulatory structure that governs the use of water, as well as a detailed understanding of and proactive attention to developments of those regulations.

## REGULATORY CONTROL

In the past the regulatory regime in Alberta has relied heavily on voluntary action by industry in order to curb the excessive use of water and the negative effects of that usage. As a result of the threat of widespread water shortage, the *Water Act*, R.S.A. 2000, c.W-3, (the “*Water Act*”) which came into effect in 1999, was established to create a framework for water management planning.<sup>5</sup> As well, the Alberta Government released the *Water for Life* strategy, which among other things outlines the process for development of approved water management plans.<sup>6</sup> Under the strategy, the province has stated that it will seek to increase water productivity by 30% over 2005 levels by 2015, through conservation, recycling and reuse.<sup>7</sup>

In furtherance of that goal, Alberta Environment has recently released the Water Conservation and Allocation Policy for Oilfield Injection and accompanying Guideline. Although the Policy and Guideline specifically do not apply to the oil sands mining operations, policy and guidelines that do apply are being considered. On March 31, 2006 the Oil Sands Consultation Group submitted its Final Report and Recommendations<sup>8</sup> to the Ministers of Energy, Environment and Sustainable Resource Development. That group, which was established in January 2006, was tasked with providing a revised plan for a consultation process for oil sands development. The Final Report makes a number of recommendations including that the scope of the consultation should include “economic, environmental and social issues in an integrated manner” and that the “entire consultation process be completed by June 2007.” Acting on that recommendation the Alberta Government established the Oil Sands Multi-stakeholder Committee, which held a series of information meetings throughout the province in September and October 2006. An interim report with recommendations focusing on “vision and principles” was to be submitted

to the Ministers of Energy, Environment and Sustainable Resource Development by the end of November 2006. That interim report is to be followed with recommendations on implementation in the spring of 2007. Specific policies, guidelines and practices in relation to oil sands development and environmental management will then follow.

The Alberta Energy and Utilities Board (“AEUB”) is directly involved in regulating the oilsands, having broad project review and regulatory powers over oilsands projects.<sup>9</sup> The diversion of water necessary for oil sands exploration requires approval under the *Water Act* from either Alberta Environment or the Department of Sustainable Resource Development.

Increased water shortages and government initiatives of this type will most certainly have significant effects on the oilsands industry in terms of the allocation and transfer of licenses, and the requirements for new technologies with effects on water consumption. Also on the horizon is the emergence of new economic instruments to control water use. The Alberta Government is leaving the door open for these types of economic instruments, including direct fees for users of water in the oilsands.

## OILSANDS DIRECT EFFECTS ON WATER

The oilsands affect water in a number of ways, including the diversion of rivers, the draining of wetlands, the stripping of soils of moisture, the creation of tailings ponds, the decreasing of water levels and the general diminishing of the health of rivers such as the Athabasca. While current oilsands operations have been licensed to withdraw 349 million cubic metres of water per year, the cumulative withdrawal of water from the Athabasca River from existing and proposed oilsands mining operations will be approximately 490 million cubic metres every year, which is nearly three times the amount of water required each year for the City of Calgary.<sup>10</sup> Other problems related to water use in the oilsands include the impracticality or impossibility of recycling water used for extraction, and the permanent removal of large quantities of water from the hydrological cycle. While these are the types of negative effects of water use that are unique to the oilsands industry,

the industry also creates non-unique water problems by excessive use of fresh water and generation of water pollution.

Use of water for oilsands development accounts for 65% of withdrawals from the Athabasca River.<sup>11</sup> The implications of the impending water crunch for the oilsands industry include the inevitable restructuring of the regulatory regime to address the water issues. This changed regime will have an impact on emerging technologies, current water use, as well as the allocation of future water licences. While actual conflicts have not yet arisen, they will occur.

**Participants in the oilsands industry will be increasingly required to have a firm understanding of the regulatory regime as it pertains to water quality and quantity. It is essential that those participants take proactive measures...**

## WATER AND THE LAW

A recent example of the interplay between water and the oilsands was shown in an application of Canadian Natural Resources Limited (“CNRL”) for an oilsands mine, a bitumen extraction plant and a bitumen upgrading plant in the Fort McMurray area.<sup>12</sup> The Joint Panel of the AEUB and CEEA found the project to be in the public interest, considering the mitigation measures proposed by CNRL and the recommendations of the Panel.<sup>13</sup> Specifically, CNRL provided a tailings management scheme, as well as a water management plan, which included surface water. The Panel found CNRL’s mitigation measures resulted in the project being unlikely to result in significant adverse environmental effects on aquatic resources.<sup>14</sup>

Participants in the oilsands industry will be increasingly required to have a firm understanding of the regulatory regime as it pertains to water quality and quantity. It is essential that those participants take proactive measures to address water issues and regulatory evolution, particularly as a result of the indications from the Alberta Government that reform is on the horizon.

The oilsands industry has a number of options, which it may choose to follow either on a proactive basis or through a reaction to inevitable regulatory changes. Those options include enhanced efficiency of water use, water recycling as well as on-site and off-site storage of the water used in production.

Although water shortages have not reached the crisis threshold to the point where operations in the oilsands cannot proceed, the risk exists. The only way for industry participants to continue production efficiently over the long term is to address the inevitable regulatory changes that lie ahead and to be actively involved in the upcoming consultative process.

## Footnotes

- <sup>1</sup> Alberta Energy and Utilities Board, *Alberta’s Reserves 2004 and Supply/Demand Outlook/Overview* (2005), Statistical Series (ST) 2005-98 at 2-7
- <sup>2</sup> *Ibid.* at 2
- <sup>3</sup> Alberta, Oil Sands Discovery Centre, “The Oil Sands Story” <[http://www.oilsandsdiscovery.com/oil\\_sands\\_story/insitu.html](http://www.oilsandsdiscovery.com/oil_sands_story/insitu.html)>
- <sup>4</sup> L. Flint, “Bitumen Recovery: A review of long term research and development opportunities” 10, [www.ptac.org/links/dl/osdfnlreport.pdf](http://www.ptac.org/links/dl/osdfnlreport.pdf); and L. Sawatsky, Golder Associates, *Improved Stewardship of Water Resources that are Entrusted to Oil Sands Mine* (presentation to Water and Land Issues for the Oil and Gas Industry), March 22, 2004
- <sup>5</sup> Randall W. Block and Joel Forrest, “A Gathering Storm: Water Conflict in Alberta” (2005) 43 *Alta. L. Rev.* 31-50 at para. 20
- <sup>6</sup> *Ibid.*, at para. 2
- <sup>7</sup> Alberta Environment, “State of the Environment-Water” (June 6, 2005) <[http://www3.gov.ab.ca/env/soe/water\\_indicators/26\\_sectoral\\_allocations.html](http://www3.gov.ab.ca/env/soe/water_indicators/26_sectoral_allocations.html)>
- <sup>8</sup> Oil Sands Consultation Group, *Final Report and Recommendations*, March 31, 2006, [www.environment.gov.ab.ca/info/library/7645.pdf](http://www.environment.gov.ab.ca/info/library/7645.pdf)
- <sup>9</sup> Steven A. Kennett and Monique M. Ross, “In Search of Public Land Law in Alberta” (1998) 8 *J. Env. L. & Prac.* 131.
- <sup>10</sup> Golder Associates Ltd., *A compilation of information and data on water supply and demand in the lower Athabasca River Reach* (2005), Prepared for the CEMA Surface Water Working Group; and Sustainable Calgary, *2004 State of Our City Report*, (2005) at 48
- <sup>11</sup> Dan Woynilowicz and Chris Severson-Baker, “Down to the last drop?” (March 2006) *Oil Sands Issue Paper No. 1* (Pembina Institute) <[http://www.pembina.org/pdf/publications/LastDrop\\_Mar1606c.pdf](http://www.pembina.org/pdf/publications/LastDrop_Mar1606c.pdf)>
- <sup>12</sup> *Canadian Natural Resources Ltd. (Re)*, [2004] A.E.U.B.D. No. 3, at para. 1
- <sup>13</sup> *Ibid.*, at para. 4
- <sup>14</sup> *Ibid.*, at para. 7

It has been approximately one year since the Alberta Energy and Utilities Board's (the "AEUB") new compliance mechanism, Directive 019, came into force. By now, all regulated entities should be familiar with the new system for assuring compliance with Board orders, directives and other measures. Directive 019 simplifies the enforcement mechanism, and aims to return non-compliant entities to good standing quickly.

### RECTIFICATION OF A BREACH

Compliance enforcement continues to be based on a risk assessment. In other words, the degree and scope of enforcement actions taken against an entity is based on the potential risk to public health, the environment or the integrity of the regulatory process caused by the entity's breach. In order to rectify a relatively minor breach, such as an administrative or filing error, it would typically require no more than an immediate remedy of a mistake and an action plan for avoiding it in the future. The same is true for a high-risk infraction such as a major spill or unauthorized production. Even though these breaches are more serious, the AEUB wishes to encourage proactive compliance and quick solutions. The AEUB would be likely to order an action plan and authorize the immediate cleanup or fixing of the problem, and if this is done correctly, punitive actions are not likely to be taken.

### TOOLS AT AEUB'S DISPOSAL

An entity climbs the enforcement "ladder" by being uncooperative or failing to provide full disclosure to the AEUB. This is true for both low-risk and high-risk non-compliant acts. For example, a failure to report an administrative error for misreporting, combined with a lax attitude in fixing it, may cause the AEUB to consider punitive or more stringent measures to enforce compliance. Tools at the AEUB's disposal include administrative monetary penalties (fines), stringent reporting requirements (often preventing the entity from returning to good standing quickly), or, if the matter is more serious, the AEUB might deny the entity routine application status. This means that the AEUB's usual self-reporting requirements for approvals will be suspended in favour of active monitoring and investigation before approvals are granted to that entity. On the high-risk ladder, the AEUB retains the option of shutting down the entity's operations province wide (including those that are not involved in the non-compliant act).

### AVOIDING SANCTIONS

The key to avoiding the higher rungs of the enforcement ladder is preparation. An entity's reporting to the AEUB should be accurate, fulsome and timely. All reporting requirements and conditions should be met, and individuals within the organization who are responsible for reports should be aware of the consequences of doing so incorrectly. Secondly, a regulated entity should know which of its approvals conditions are hardest to meet, particularly in terms of cost, time investment or labour. It is likely that the type of breach for which a company might be penalized will be related to an approval condition that is perceived as onerous, unimportant or obscure. Lastly, effective loss management and disaster planning, combined with a reliable and tested emergency protocol, will help avoid the worst ramifications of a typical high-risk infraction.

# New Compliance Enforcement Mechanism at the AEUB

by Brandon Barnes

The AEUB looks to regulated entities to self-police and report their mistakes. In exchange for this, most approvals are given on a routine basis, with the AEUB accepting the entity's representations as to their compliance with AEUB orders and rules. Given the high cost of litigation and compliance management, entities are highly recommended not to squander a favourable status with the AEUB. A pattern of transgressions is likely to cause the AEUB to rethink that company's standing which may have effects for many years to come.



## What We've Been Up To

Alicia K. Quesnel is the current President of the Canadian Petroleum Law Foundation, having served 7 years as a director and holding various positions in the Foundation including Membership Coordinator, Jasper Seminar Chair and Vice President.

Arnie Olyan is the current Chair of the Southern Alberta Construction Subsection of the Canadian Bar Association ("CBA").

Carolyn Wright is currently an executive member of the CBA Natural Resources Section and a member of the Canadian Petroleum Law Foundation Jasper Conference Organizing Committee.

Stuart Money taught an introductory course in Title Review at the Canadian Petroleum Law Foundation's Kananaskis Seminar in Fundamental Oil and Gas Law in September, 2006.

John Taylor and Arnie Olyan spoke to a Joint Meeting of the Southern Alberta Natural Resources and Construction subsections of the Canadian Bar Association on Nov. 24, 2006 on the subject of "The EPC Contract: Owner and Contractor Perspectives".

In November 2006 Carolyn Wright and John Goetz taught a course on "Freehold Lessor Estates" for the Canadian Association of Petroleum Land Administrators.



# Energy

**B**D&P's Energy Team 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 Energy Team works 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.

The practitioners on BD&P's Energy Team offer 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
- AMIs
- 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 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 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

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