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ENERGY

M A T T E R S

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A Look at Recent Limitation Period Developments

INABILITY TO REDUCE LIMITATION PERIODS:

Consumer Protection or Corporate Pitfall?

by Alicia Quesnel

INTRODUCTION

On April 1, 2006 a controversial amendment to the *Limitations Act*, R.S.A. 200, c.L-12 (“the *Limitations Act*”) was proclaimed in force in Alberta. The amendment is set out in Section 7(2) and provides

7(2) An agreement that purports to provide for a *reduction* of a limitation period provided by this Act is not valid. (Emphasis added)

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A limitation period is the period of time, specified by statute, during which a civil claim must be brought. The Alberta Act permits an extension of a limitation period by express agreement of parties.

Interestingly, this section prohibiting the reduction of a limitation period had been proclaimed by the Alberta government back in May 2003. However, it was rescinded before taking effect, no doubt as a result of lobbying by lawyers and others who raised concerns that the amendment might have unintended consequences. Those concerns have not changed.

BACKGROUND

By way of background, the impetus for the proposed legislative change in Alberta was to address concerns “regarding situations where there is an imbalance of power between two parties and one party may be in a stronger bargaining position to reduce a limitation period.”¹

While the power imbalance concern provides some validation for the legislative amendment, there is, rightly, substantial concern among the Alberta legal and business communities that Section 7(2) may be detrimental to the interests of the business

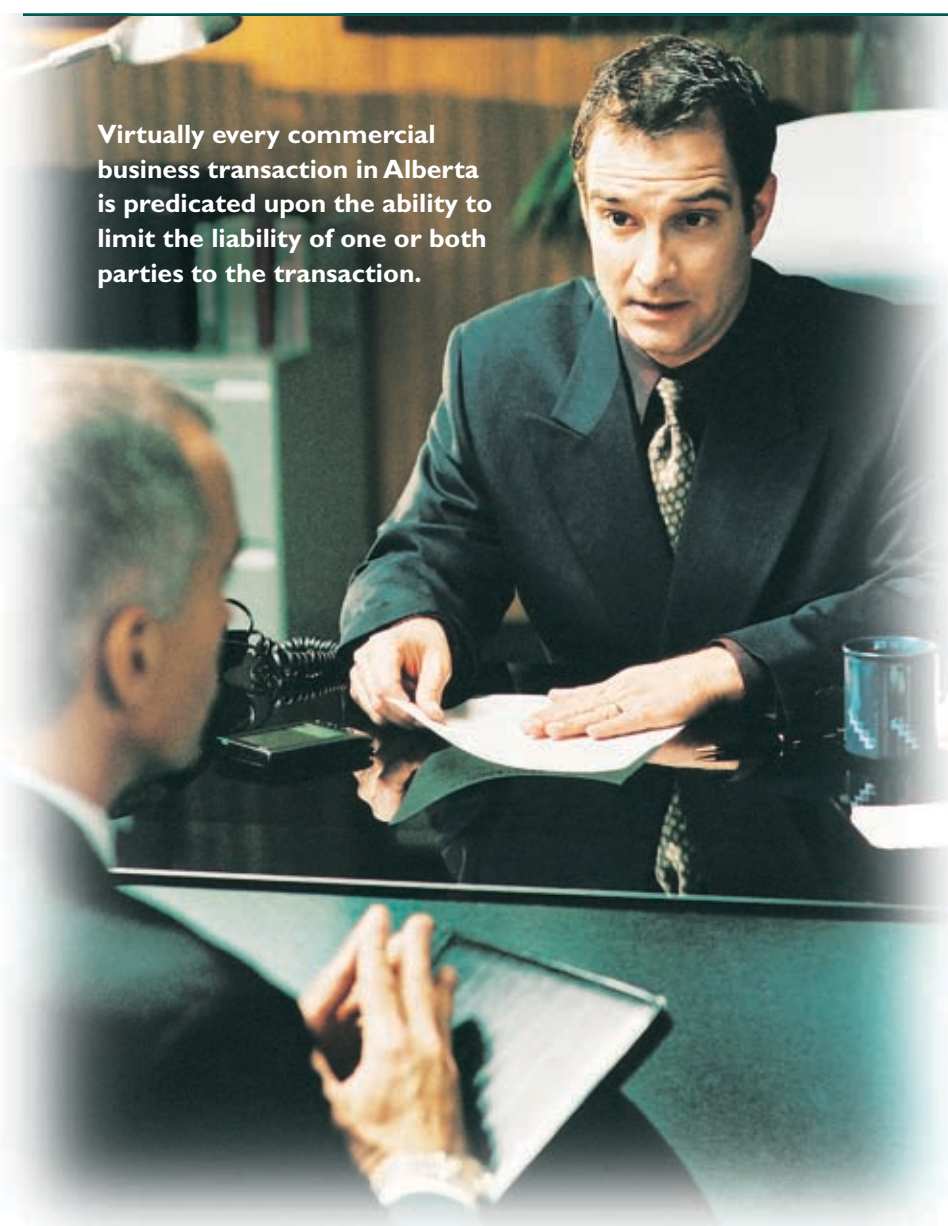
community. This is so since the amendment has the potential to alter the allocation of risks and liabilities that parties have freely and expressly negotiated. In addition, the result can import costly uncertainty into their business transactions.

Virtually every commercial business transaction in Alberta is predicated upon the ability to limit the liability of one or both parties to the transaction. These limitations of liability take a number of forms, such as: (i) a limitation on the ability of a party to claim consequential damages; (ii) a limitation on the ability of a party to bring a claim if the aggregate of all amounts claimed exceed a certain monetary threshold; or (iii) a limitation on the ability of a party to bring a claim unless the aggregate value of that claim exceeds a minimum threshold. Commercial parties also use notice requirements for this purposes. Thus, if notice is not given within a specified period, the party against whom the claim is made will have no liability.

A typical notice requirement in a commercial contract might read:

The representations and warranties set forth in the preceding clauses shall be true on the Effective Date and on the Closing Date, and such representations and warranties shall continue in full force and effect and shall survive the Closing Date for a period of one (1) year, for the benefit of the Party for which such representations and warranties were made; provided that *no claim or action shall be commenced with respect to a breach of any such representation or warranty unless, within such period, written notice specifying such breach in reasonable detail has been provided to the Party which made such representation or warranty.* [emphasis added]

Representatives of Alberta Justice have suggested to us that Section 7(2) of the Limitations Act is not intended to apply to these types of clauses if they are properly drafted. But this suggestion raises the question that if commercial parties can “properly draft” clauses to avoid the application of Section 7(2), why cannot this drafting also be done in the “consumer context”, thereby thwarting the rationale cited by the government in support of Section 7(2).



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SHORTENING A LIMITATION PERIOD OR LIMITATION OF LIABILITY

Certainly, an argument can be made that this type of clause does not attempt to shorten a limitation period, but rather, is an agreed upon “limitation of liability”. There is no cause of action for claims made outside the specified period because the parties have chosen to limit the substantive right for breach of representations and warranties rather than to limit the time frame within which to start the action.

At this time, it is not certain whether courts will treat the notice requirement as a limitation of liability or as an attempt to shorten a limitation period.

At this time, it is not certain whether courts will treat the notice requirement as a limitation of liability or as an attempt to shorten a limitation period. It may be that the courts will be able to distinguish between the effectiveness of notice provisions as “limitations of liability” in bargained agreements between sophisticated commercial parties and those that might be found in consumer “contracts of adhesion”. The basis for such a distinction rests on sound policy considerations; however, the

implementation of such a distinction may prove to be too difficult a path for courts to follow. A court might simply decide that the “plain meaning” of the words used in the proposed Section 7(2) does not support the application of such a policy distinction in any event.

THOUGHTS FOR DRAFTING

For now, we would suggest the best way to deal with the potential implications of Section 7(2) is to make it clear that the parties intend the notice provisions to operate as a limitation of liability and as part of their negotiated allocation of risks and liabilities under the contract. To do this, the following drafting points should be considered:

- (1) specify that, following closing, the representations and warranties will not merge, but will survive the closing for a specified period (a “survival period”);
- (2) specify that claims can only be brought under the contract (including for breach of representation and warranty) under the indemnity provisions of the agreement and ensure that the parties each waive any causes of action that exist outside of the contract. For example, causes of action can exist concurrently in tort (ie. negligent performance) and contract (breach of performance standards). The only basis for a claim should exist under the contract;

- (3) include the “notice requirement” for claims in a general “limitations of liability” subsection and rather than specifying that “no claim may be brought”, limit the substantive right to a claim. For example, state that “no party shall have a right to indemnification under this agreement for a breach of a representation and warranty by the other party after the expiry of the survival period unless notice of a claim for indemnification is given prior to the expiry of the survival period”; and
- (4) insert a clause that clearly identifies the notice requirement as a limitation of liability, such as the following clause:

The Parties acknowledge and agree that an obligation under this agreement to provide written notice of a claim within a period and in a manner specified under this Agreement is intended by the parties as a limitation of liability that represents a fair and equitable allocation of the risks and liabilities each Party has agreed to assume in connection with the subject-matter hereof.

Footnotes

¹Alberta, Legislative Assembly, *Hansard*, (20 March 1996) at 707 (Mr. Herard).

What We've Been Up To

John Taylor and Arnie Olyan presented a paper entitled “The EPC Contract and the Energy Lawyer” at the Canadian Petroleum Law Foundation Conference in Jasper, AB in June, 2006.

Doug Mills spoke at a meeting of the Association of General Counsel of Alberta on June 8, 2006 on the issue of the obligations of parties in “negotiations”, with particular reference to the Alberta Court of Appeal decision in *Xerex v. PetroCanada*.

Jody Wivcharuk will be entering her sixth consecutive year on the Board of Directors for the Petroleum Joint Venture Association (“PJVA”) in the portfolio of Director-at-Large. Her role is to provide the PJVA with an informal legal perspective in relation to its many initiatives and activities, including the PJVA certificate program with Mount Royal College.

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.

Doug Mills, Jeff Sharpe and Brandon Barnes wrote a paper “Key Settlement Options for Individual Defendants in Multi-party Litigation: Pierringer and Mary Carter Agreements”, published in the 2005 Annual Review of Civil Litigation.

The firm recently applied to be an associate member of PSAC - the Petroleum Services Association of Canada, the national trade association representing the service, supply and manufacturing sectors within the upstream petroleum industry.



EXPIRED

When Does Your Limitation Period Begin To Run

And How To Interpret The Ten Year Bar

by Rahim Moloo, Student-at-Law

INTRODUCTION

In the recent case of *Meek v. Resources Inc.*, [2005] A.J. No. 1745, 2005 ABCA 448 (“Meek”), the Alberta Court of Appeal clarified the law regarding two important sections of the Limitations Act, R.S.A. 2000, c. L-12, (“the *Limitations Act*”). This case involved an oil company, San Juan Resources Inc. that was unaware of its royalty obligations to the beneficiaries under a trust agreement, the Meeks, who were also unaware that the royalties

were not being paid. The Meeks brought a claim within two years of learning of the breach of the trust agreement for missed royalty payments dating back longer than ten years.

The relevant limitation periods are outlined in section 3(1) of the *Limitations Act*:

- 3(1) Subject to section 11, if a claimant does not seek a remedial order within
- (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

- (i) that the injury for which the claimant seeks a remedial order had occurred,
- (ii) that the injury was attributable to conduct of the defendant, and
- (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

or

- (b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

COMMENCEMENT OF LIMITATION PERIOD

First, the Court clarified the appropriate test for when it is that a party ought to have known of its claim for the purposes of the commencement of the limitation period. The Court of Appeal found that the test for whether a party ought to have known of their claim is that of “reasonable diligence” analyzed in light of the three factors set out in s. 3(1)(a) of the *Limitations Act*. This test was more explicitly outlined in *De Shazo v. Nations Energy Co.*, [2005] A.J. No. 856 (“*De Shazo*”) at para. 28: “The claimant must know or have been reasonably able to discover that: (i) the injury occurred; (ii) the injury was attributable to the conduct of the defendant; and (iii) the injury warrants bringing a proceeding.” All three of these factors must be known to a prospective plaintiff before the limitation period begins to run.

As an illustration of the application of the test confirmed in *Meek*, it is helpful to briefly consider the facts of *De Shazo*. In that case, the plaintiff was claiming that each of the defendants breached a duty of care to prevent a fraudulent scheme whereby oil revenues were diverted from Nations Energy Company (an Alberta company in which the plaintiff held an indirect interest). *De Shazo* alleged that this led to the undervaluing of certain shares which were transferred to two of the defendants for a price well below fair market value. The Court of Appeal found that *De Shazo* had sufficient information in its possession to bring a claim well before two years prior to the commencement of the claim, and as such, the claim was statute barred. This knowledge was evidenced by the fact that *De Shazo* had sought legal advice on the relevant issues three years before the commencement of the claim and had threatened the very action that was later brought in this claim more than two years prior. Although *De Shazo* claimed that it only had suspicion of a possible claim and was not certain that any injury warranted bringing a claim (as required by the test) until finally deciding to commence this proceeding, the Court stated that “[t]he principle of discoverability does not require perfect knowledge” and that “very few people who sue have perfect certainty”.

THE TEN YEAR ABSOLUTE BAR

Second, the Court in *Meek* considered section 3(1)(b), of the *Limitations Act* which provides for an absolute bar to claims that arise more than ten years prior to the commencement of an action. There is somewhat of an exception to this ten year absolute bar provided by section 3(3)(a). Section 3(3)(a) of the *Limitations Act* reads:

- (3) For the purposes of subsection (1)(b),

- (a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, arises when the conduct terminates or the last act or omission occurs...

Prior to the case being heard by the Court of Appeal, the Trial Judge found that the ten year absolute limitation did not apply because each missed payment stemmed from the same contract, constituting a “continuing course of conduct” and as such section 3(3)(a) of the *Limitations Act* (above) would govern. The Trial Judge found that since the conduct (i.e. the non-payment) had not yet terminated, the limitation period had not yet begin to run.

The Court of Appeal stressed the policy reason for the ultimate bar on claims. The

Court stated at para. 37 that “[f]rom the standpoint of certainty, there comes a time when defendants should be secure in the expectation that they will not be held to account for ancient obligations”.

The Court of Appeal found that the Trial Judge’s interpretation was not in keeping with the spirit of the ultimate limitation period. The Court of Appeal stated at para. 46 that s. 3(3)(a) applied when “the damage [did] not result from a single act but from the effect of many (related) acts occurring over time.” Two examples used by the Court in illustrating when section 3(3)(a) would apply were 1) in a case involving the release of toxic emissions over a nearby farm and 2) in a case where an employee of a company has repeated exposure to nuclear radiation. In both of these examples, it is not easy to assess when the actual claim arose.

In the instance of a breach of contract where there is a series of failures to make periodic payments, it is easy to ascertain when each breach occurred and what damage has been suffered. The Court affirmed that “[a] cause of action for breach of contract arises when the breach occurs.” As such, each non-payment gave rise to a separate claim. Given this, the Court of Appeal found that the claim was barred for any payments due ten or more years prior to the commencement of the action.

In the oil and gas industry generally, there are cases where section 3(3)(a) of the *Limitations Act* would serve as an exception to the ten year absolute bar to a claim, especially in law suits involving environmental issues; however, this exception does not apply to missed (royalty) payments under the same contract, each of which gives rise to a new claim.



WATER

Today And Tomorrow

by Patricia Quinton Campbell
and Melissa Moulton Tennison

A PRECIOUS RESOURCE

Water is a resource necessary for survival—physically, environmentally and economically. The demands on this resource are increasing. Municipalities need increasing amounts of water as their populations increase. Agriculture, and in particular irrigation, remains a significant, and in Southern Alberta an increasing, use of water. The oil and gas industry is increasing its water use for activities such as drilling, enhanced recovery and oil sands exploitation. Notwithstanding above average rainfalls for the past two springs, the long-term view predicts water shortages and, if media reports are to be believed, a looming water crisis. All parties involved are recognizing that increased water management is necessary to prevent such crisis.

The Alberta Government's response to the growing pressures of maintaining a healthy and sustainable water supply was the development of *Water for Life: Alberta's Strategy for Sustainability*. The *Water for Life Strategy* is based upon three key goals, or outcomes:

- ▶ Safe, secure drinking water supply;
- ▶ Healthy aquatic ecosystems; and
- ▶ Reliable, quality water supplies for a sustainable economy.

These three key goals are driving the actions taken by the Alberta Department of Environment ("AENV") and the development by AENV of policies and guidelines for current and future water management.

THE WATER ACT

The Water Act¹ provides the primary legislative framework for the management, conservation, and protection of Alberta's water. In Alberta, the Crown owns all water and it is the Crown (i.e. the government) that controls the right to use water.

Unlike its predecessor legislation, the *Water Resources Act*, which was primarily concerned with water allocation, the Water Act, which replaced the *Water Resources Act* in 1999, is designed to protect and manage Alberta's water. Under the Water Act, licenses are granted to a user for the right to use water for a specified period of time. The priority of the

license is based on a first in time, first in right licensing system. Under this system, older licenses, those with lower priority numbers, are given a higher priority to divert water. The priority system becomes important in times of water shortages. When shortages occur and there is a limited amount of water to be diverted from a water body, the licence with the highest priority (i.e. the lowest number) is able to take out their allocated share of the water first. There is no pro-rata element to the system such that lower priority licensees may be left with little or no water to divert.

CATEGORIES OF WATER RIGHTS HOLDERS

Under the Water Act, there are four categories of water rights holders²:

1. existing licensees;
2. household users;
3. traditional agricultural users; and
4. new licensees.

Existing licensees

Existing licensees are parties who were granted rights to water under legislation enacted prior to the Water Act. Such a deemed licence provides the right to divert water for a particular purpose and up to a specific amount. These licences rarely have expiry dates.

With the enactment of the Water Act these deemed licences were transitioned to the new system and maintain their relative priority position in the allocation system. Holders of such licences are entitled to divert the water under their licence subject to the terms and conditions of that licence notwithstanding that these terms and conditions may be inconsistent with, or contrary to, the Water Act.

Household users

Household users of water are provided with priority over all other users. A household user may use water for household and related purposes up to 1250 cubic metres per year without a licence. Such use enjoys priority over any licensee. Under the Water Act household users were granted, for the first time, the right to divert ground water for household purposes. A household user designation is limited to three per parcel and does not apply to anyone who takes water from a municipal system.

Traditional Agricultural Users

The Water Act provides an exemption from the requirement to obtain a licence for agricultural users, where the agricultural user is diverting up to 6250 cubic metres of water for the purposes of raising farm animals or applying pesticides to crops as part of a farm (other agricultural users in excess of one acre foot per year must obtain a licence). The Water Act does not provide, however, any priority for this use such that in times of water shortage an unlicensed agricultural user would be unable to defeat the claim of a licensed user even if the license was obtained after the traditional agricultural use began.

To remedy this issue, the Water Act allows traditional agricultural users to “grandfather” the priority of their right according to when the water was first used. This grandfathering occurs by virtue of an expedited water right called a registration which allows an exempt agriculture user to gain priority based on the first known date the water was used for the particular agricultural purpose, but no earlier than July 1, 1894.

New Users

New users are able to obtain a license by application under the Water Act. All new licenses are issued for a specified term after which they will expire unless renewed. There

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on Water Use Practice and Policy issued its recommendations. Those recommendations have found implementation in the 2006 *Water Conservation and Allocation Policy for Oilfield Injection* (the “Policy”) and the accompanying *Water Conservation and Allocation Guideline for Oilfield Injection* (the “Guideline”).

As noted in the Policy “the ultimate goal of the policy and guidelines is to reduce or eliminate allocation of non-saline (fresh) water for oilfield injection, while respecting the rights of current licence holders”. The Guideline applies to enhanced recovery schemes throughout the province where there is a term licence or new licence. The Guideline must be followed where there is:

- ▶ A licence renewal application for projects already operating and licenced to use non-saline water resources; and
- ▶ A new licence application for oilfield injection use of non-saline water.

Licences, which were issued under prior legislation, generally do not require renewal and as such are not caught by the Guideline. Holders of such licences are, however, “encouraged” to cooperate with the intent of the Policy. AENV is undertaking discussions with the holders of all such permanent licences to request a voluntary review of the licence using the Guideline as a point of reference.

Coalbed Methane

In recent years increases in natural gas prices, maturing conventional natural gas reserves and the development of new technologies have combined to make the development of coalbed methane more attractive and economically feasible. With the development of coalbed methane, however, comes an increased risk to Alberta’s water aquifers and water supply. The concern over this risk has been highlighted by the recent media attention and increase in complaints to AENV over the effect of coalbed methane wells on landowner’s water wells.

Through June of 2006 AENV hosted a series of public information sessions in central and southern Alberta to address the concerns about the effect of coalbed methane development on groundwater supplies. The presentations focused on groundwater facts, regulatory requirements and groundwater protection initiatives.

is considerable security for renewal of the license and the onus is on the Government for proving why a renewal is not allowed. The Water Act also provides security where a particular project spans over a period of time. Broadly speaking, the legislation allows a party to maintain their initial priority over other users who obtain water rights in the interim while the project is proceeding.

New licences issued under the Water Act generally contain extensive conditions often including the right of the Crown to curtail allocations. The Water Act provides a list of matters which the Director must and may consider prior to issuing a new licence. One matter that the Director must consider are factors contained in an approved water management plan. Although, as discussed below, only the South Saskatchewan River Basin water management plan is close to completion,

the contents of water management plans will have a significant impact on the issuance of new licences.

RECENT DEVELOPMENTS IN THE OIL AND GAS INDUSTRY

One of the key goals of the *Water for Life Strategy* is to ensure reliable, quality water supplies for a sustainable economy. In Alberta that means, to a great extent, the oil and gas industry. The following is a brief overview of some of the recent initiatives, policies and issues pertinent to water and the oil and gas industry:

Underground Injection

In response to concerns raised during public consultation of the *Water for Life Strategy*, an advisory committee was formed to examine the use of fresh water for underground injection. In 2004 the Advisory Committee

Coalbed methane is regulated in Alberta under the same rules that apply to conventional oil and gas. The Alberta Energy and Utilities Board (the “EUB”) regulates drilling, production, transportation and other activities in relation to coalbed methane as it does for conventional oil and gas. AENV is involved in granting an approval with respect to coalbed methane where there is a diversion of non-saline water and may be subsequently involved regarding a release where the coalbed methane is found to have impacted the water resources.

AENV and the EUB have developed, or are developing, a number of initiatives to address the potential adverse impact of coalbed methane production on water resources including:

- ▶ The development by AENV of the *Standard for Baseline Water-Well Testing for Coalbed Methane Operations*. In accordance with that Standard, effective May 1, 2006, companies wanting to drill for coalbed methane above the base of groundwater protection must offer to collect baseline testing information on any active water well within a minimum 600 metre radius of new or re-completed coalbed methane wells. The tests will measure the water well’s production capability, water quality (including bacteria), and the absence or presence of gas in the water well (including methane gas).³

The data obtained from the testing is to be submitted to both Alberta Environment and the landowner.

- ▶ In support of the AENV Standard the EUB issued Directive 35 on May 8, 2006. Pursuant to Directive 35 the EUB modified its well licence and recompletion requirements to incorporate the AENV Standard. The revisions are found in Directive 35 and are incorporated into *Directive 56: Energy Development Applications and Schedules* under Section 7.9: Technical Requirements.

In accordance with Directive 35 the EUB is requiring compliance with the AENV standard for all coalbed methane wells above the base groundwater protection as follows:

- (a) Wells licensed on or after May 1, 2006 must meet the AENV Standard and the requirements incorporated in Directive 56 noted above;
- (b) Wells licensed prior to May 1, 2006 but drilled and completed after June 1, 2006 must meet the AENV Standard;
- (c) Wells licensed prior to May 1, 2006 and drilled and completed on or before June 1, 2006 do not require compliance however, the EUB “strongly encourage[d]” licensees to meet the AENV standard; and
- (d) Wells licensed and drilled prior to May 1, 2006 and completed or recompleted after June 1, 2006 are required to meet the AENV standard, and the applicable data submission requirements from *Directive 59: Well Drilling and Completion Data Filing Requirements*, notwithstanding that no application is required prior to completions or recompletions.

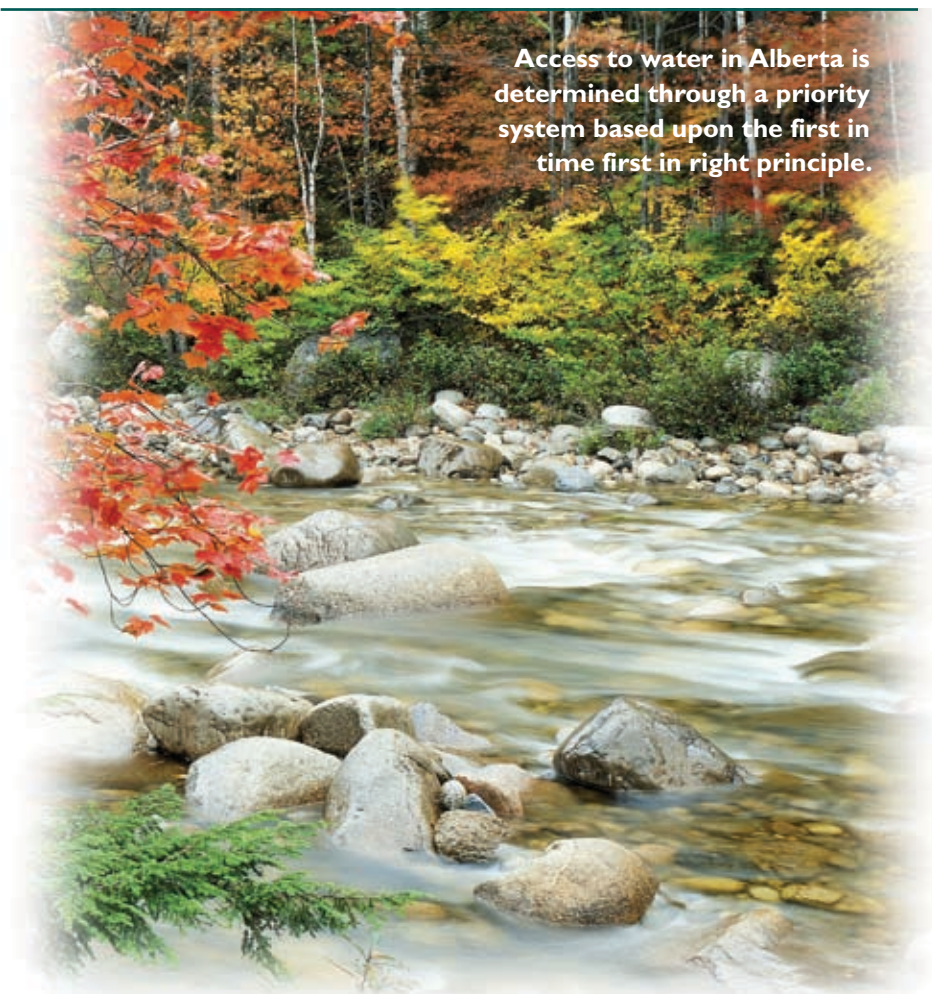
Effective July 1, 2006 the EUB will be initiating enforcement action for any non-compliance with Directive 35.

- ▶ AENV is developing a Code of Practice for small fresh water diversions for coalbed methane projects.

Water Allocation, Shortages and Basin Closures

As noted above, access to water in Alberta is determined through a priority system based upon the first in time first in right principle. When there is an abundance of water, or at least when there is no clear shortage, disputes over priorities are limited. As water shortages become more of a reality and, as in Southern Alberta, there are plans to close river sub-basins to further licences such priority disputes and claims to water will increase.

A recent example of such a dispute is the 2004 Canadian Natural Resources Limited (“CNRL”) Horizon Oil Sands Project application before



Access to water in Alberta is determined through a priority system based upon the first in time first in right principle.

a joint review panel of the EUB and the Government of Canada (through the Canadian Environmental Assessment Agency)⁴. In that application Syncrude Canada intervened to ensure that its existing approvals and investments were protected. Syncrude holds a water licence in priority to that which would be sought by CNRL and sought confirmation that any water licence issued to CRNL could not impact Syncrude's existing licence. AENV asserted that it believed that "there were sufficient volumes of water in the Athabasca River to satisfy CNRL's allocation request and that of other potential users". AENV also asserted that the "timing of withdrawals during low flow might require careful management". This assertion appears to suggest an AENV position that it could "manage" allocations. This would appear to be contrary to the statutory right of Syncrude, as the holder of a licence with a lower priority number, to insist on its entire allocation before any water flows to a licence holder with a higher priority number.

In reaching its decision the Panel noted that a timely determination of the Instream Flow Needs ("IFN") for the Athabasca River was necessary to preserve the future integrity of the river, but accepted the evidence of CNRL and AENV that a decreasing trend in low flows was not apparent. Based on the evidence before it the Panel concluded that significant adverse environmental effects associated with water withdrawn from the Athabasca River for use in the project were unlikely. Interestingly, the Panel also noted its view that AENV "has the ability to revise all water licences regardless of priority, should it become necessary to meet the requirements of the IFN". The Panel did not address how such revision, particularly in the case of permanent licences, would occur. The Panel also did not clearly accept, or address, as it was not necessary to do so in this case, the ability of AENV to "manage" allocations in the face of the statutorily protected first in time, first in right principle.

As noted above the Water Act provides a significant impact for water management plans developed for the Alberta river basins. Phase 1 of the South Saskatchewan River Basin Water Management Plan is the only such plan to be obtained approval.

The *Draft Water Management Plan for the South Saskatchewan River Basin* (the "Draft SSRB Plan"), which combines Phase 1, which has

been approved, with Phase 2, was released October 18, 2005. The Draft SSRB Plan has as its primary recommendation that:

AENV stop accepting applications for new water allocations in [the Bow, Oldman, and South Saskatchewan River] sub-basins until a Crown reservation is in place ...

The recommendation is, in effect, to close these sub-basins to any new water licences. It is anticipated that the Draft SSRB Plan will be approved in final form shortly, with no anticipated change to this recommendation.

If the DRAFT SSRB Plan is approved without change to the closure recommendation, issues of both obtaining and maintaining priority will increase. The closure will also likely foster the development of a more robust market for the transfer of water allocations.

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Transfers of water allocations are allowed under the Water Act where an application is made to the Director and the ability to transfer the water allocation is authorized by an approved water management plan or an order in council. The Draft SSRB Plan (the approved portion of which contains the transfer provisions) authorizes the Director to consider applications to transfer water allocations. The Director may attach conditions to a licence transfer and is authorized, if of the opinion that it is in the public interest, to withhold up to 10% of an allocation of water under a licence that is being transferred.

Aboriginal water rights

Since the 2004 decision of the Supreme Court of Canada in *Haida Nation v. British Columbia and Weyerhaeuser*⁵ the law has been clear that it is the Crown which owes a duty to consult to First Nations who are directly affected by a project. The practical reality, however, is that the Crown, and in particular AENV when dealing with water, has no vested interest in insuring that the consultation takes place in a manner, or on a time line, acceptable to

the project proponent. Consequently, while the Haida case made it clear that neither the project proponent nor the EUB has a duty to consult, project proponents should, and are, taking proactive steps in engaging affected First Nations in a consultation process.

It should also be noted, that while the issue is not settled; First Nations have raised, in a number of circumstances⁶, the jurisdictional/constitutional issue of whether the Water Act has any application to First Nation lands and the water running through it. Such a claim, if ultimately upheld, would deprive the Alberta Government of its right to control the water once it reaches the boundaries of First Nation lands, would impact the rights of any licence holder downstream of First Nation lands, and their ability to obtain water, and would impact the rights of licence holder upstream of First Nation lands should further claims by First Nations that the Provincial Government cannot impact the water on lands it does not control, be upheld. Such issues are complex and will be extremely time consuming and costly to determine. Fortunately for the government and industry the battle over the issue has been substantially avoided to date. However, given the increasing importance of water, and the potential shortages and sub-basin closures it is likely that the courts will be called upon to determine the issue in the future.

CONCLUSION

With the increasing demands on water in Alberta the competition over the right to water and its management will also increase. Shortages, or potential shortages, create conflict. The proactive measures taken by AENV and the oil and gas industry on water issues will continue to be important. Oil and gas companies are well served to have an understanding of the issues currently facing them including what can be and what is being done to address arising concerns.

Footnotes

¹Water Act, R.S.A. 2000, c.W-3 ("the Water Act")
²*Ibid*, Part 3
³Alberta Environment *Standard for Baseline Water-Well Testing for Coalbed Methane Operations*
⁴EUB Decision 2004-005
⁵[2004] 3 S.C.R. 511 (S.C.C.)
⁶See for example the position of the Siksika Nation as noted by the Alberta Environmental Appeals Board in Appeal No. 03-010-CD

Petroleum Storage Tank Sites: Managing Contamination

by Patricia Quinton Campbell

RECENT CHANGE

On June 9, 2006, the Alberta Department of Environment (“AENV”) took the next step in its new system designed to enhance management and encourage cleanup of contaminated petroleum storage tank sites in Alberta. As of June 9, 2006

all environmental site assessment reports related to petroleum storage tank sites must be signed by a member of the Association of Professional Engineers, Geologists and Geophysicists of Alberta (“APEGGA”) before they are submitted to AENV. In addition, an APEGGA member is required to oversee the reporting, management and cleanup on all petroleum storage tank sites.



Under the new requirements the environmental site assessment reports will be screened by AENV on the basis of a risk-based approach. As a result of the screening, the site will be ranked in accordance with its potential for an adverse impact on human health, safety and the environment. Those sites which are ranked as high priority will receive additional attention from AENV, which will involve AENV working closely with the responsible parties to ensure that those sites are managed in accordance with AENV's standards.

This new process will replace the written feedback, including comfort letters that have been previously issued by AENV with respect to environmental assessment reports.

BACKGROUND

In October 2001 AENV introduced its "Risk Management Guidelines for Petroleum Storage Tank Sites" which replaced earlier remediation guidelines. The 2001 Guidelines apply to both underground and aboveground storage tank facilities, which contain, or have contained, gasoline, diesel, heating oil and aviation fuel. They do not apply where the storage facilities relate to used oil, a solvent or related hydrocarbon, or where the site is a component of a facility where there are other contaminant sources (ex. upstream oil and gas lease, industrial plant, etc). Reclamation of upstream oil and gas sites is dealt with in accordance with section 137 of the Alberta *Environmental Protection and Enhancement Act* ("EPEA").

The 2001 Guidelines were designed to provide a site management process specifically for soil and ground water contamination originating from existing or former petroleum storage facilities. In the 2001 Guidelines the remediation criteria were updated and a process was developed for determining alternate site-specific management objectives. The 2001 Guidelines can be found on the AENV website at: www.environment.gov.ab.ca/info/library/6156.pdf.

The 2001 Guidelines set out a risk management process to be undertaken once a spill or leak from a petroleum storage tank has been identified. In accordance with that risk management process all proponents are required to conduct a site investigation to determine the nature and extent of the contamination. The requirements of that site investigation are set out in Appendix A to the Guidelines but require both Phase I and Phase II environmental assessments. The requirements detailed in Appendix A of the 2001 Guidelines incorporate by reference the Phase I and Phase II environmental site assessment criteria from the Canadian Standards Association (information products Z768-94 and Z769-00 respectively). However, the 2001 Guidelines do not contain any requirement that there be any form of 'sign-off' by designated professionals.

The recent requirement for 'specialist sign-off' by an APEGGA member, and the requirement for their involvement in the reporting, management and cleanup on all petroleum storage tank sites arose in conjunction with the initiative of the Alberta Provincial Government in 2003 to create a 'specialist sign-off' system in relation to reclamation of upstream oil and gas sites in accordance with Section 137 of EPEA. While the section 137 system has not yet developed to the point where AENV has officially designated the specialist who must sign-off on applications for reclamation certificates, it is expected that once the official designation is made by AENV, the designated specialist will conduct and review reclamation and remediation work on all upstream oil and gas sites, including Phase I and Phase II environmental site assessments. The specialist will also certify the accuracy and completeness of the reclamation and remediation work on a site for the purpose of obtaining a reclamation certificate. At present the "specialists" are merely listed on the addendum to the reclamation certificate application form and they do not have any sign-off role.

Under the new requirements the environmental site assessment reports will be screened by AENV on the basis of a risk-based approach. As a result of the screening, the site will be ranked in accordance with its potential for an adverse impact on human health, safety, and the environment.

In conjunction with the initiative for the upstream oil and gas sites, AENV undertook a similar review and process related to contaminated petroleum storage tank sites. As a result of that process and review the June 9, 2006 amendments, as discussed above, have been brought into force.

NEXT STEPS

AENV has advised that while APEGGA is currently the only professional organization authorized to sign-off on petroleum storage tank environmental assessment reports, AENV is working with other professional regulatory associations to potentially broaden the scope of persons formally recognized and qualified to conduct assessment work on contaminated sites. The Remediation and Reclamation Sign-Off Advisory Committee ("RRSAC") has been tasked with recommending whether other professional groups should be included in those with authority to 'sign-off'. RRSAC is a stakeholder committee representing professional regulatory organizations and other consulting groups involved in environmental assessment and management.

In addition, AENV has announced that it will introduce remediation certificates for petroleum storage tanks in the fall of 2006. The remediation certificates will be issued to applicants to confirm that a contaminated area has been cleaned up in accordance with AENV standards and are intended to provide an incentive to cleanup contaminated petroleum storage tank sites by providing regulatory closure after a limited period of liability. That period of liability is yet to be determined.



Fuel Tax Refunds: Update

by Michel H. Bourque

On December 6, 2005, Alberta Tax and Revenue Administration published its revised Information Circular TEFU-2R1, which deals with exemptions from Alberta Fuel Tax in certain conditions. The thrust of the circular is to implement prescribed rebate off-road percentages ("PROP") effective January 1, 2006. This circular represents the conclusion of consultations with industry regarding the simplification of the rebate process.

Under the *Fuel Tax Act*, R.S.A. 2000, c. F-28, rebates for use of tax-paid fuel (clear fuel) is eligible for refund where the fuel is consumed

elsewhere than on public roads in Alberta. One of the largest groups to benefit from the refund program is the oil and gas industry. Until 2006, the process of determining the fuel tax rebate was complicated in that users had to compile yearly surveys which tracked usage on- and off-road, engine consumption rates for each vehicle, as well as fuel consumed by each type of vehicle used in oil and gas operations. Often, due to the complexity of the requirements, oil and gas producers would engage tax consultants to manage the rebate process at a significant cost.

The new Information Circular simplifies the process by prescribing percentages of fuel

tax rebated by activity and type of vehicle. The only remaining variable that must be compiled is the quantity of fuel consumed by each vehicle.

The new Information Circular also addresses certain fuel uses that were previously overlooked in fuel tax rebates. Principally, the Information Circular allows for a rebate of fuel tax where the fuel is used other than for consumption in a combustion engine, such as for fuel for use in fracturing and down-hole service (e.g., injection into wells, fracturing activities).

The Information Circular is available on the Alberta Finance website.



Energy

BD&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.

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- Leading edge projects such as coal bed methane projects
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- 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
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- Farmout Agreements
- AMIs
- Royalty disputes
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- Accounting disputes
- Operating disputes
- Fiduciary duties
- Lease interpretations including rights of first refusal and other title questions
- Environmental liabilities
- Oil and gas evaluation disputes

Regulatory – Energy

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.

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- 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
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