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BARRISTERS & SOLICITORS

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WESTERN CANADIAN BUSINESS LAW

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INTRODUCTION

This edition of the energy law newsletter has stories from British Columbia, Alberta and the Northwest Territories. Lawyers who authored the stories in this newsletter are Lewis Manning (in Calgary, at 403-781-9458); Ian Webb (in Vancouver, at 604-631-9117); and Keith Bergner (in Vancouver, at 604-631-9119). Questions regarding this newsletter should be directed to the editor, Jeff Christian, at 604-631-9115.

Back editions of this newsletter may be found at www.lawsonlundell.com in the Energy Law Group section.

BRITISH COLUMBIA

BC Hydro to be Electricity Self Sufficient by 2016

In our March 2007 Energy Law Bulletin we reported the highlights of the Province's new *BC Energy Plan: A Vision for Clean Energy Leadership* (Energy Plan 2007). One of Energy Plan 2007's key policy actions for the electricity sector – British Columbia will be self-sufficient in electricity by 2016 – has now been given the force of law by a regulation made under the *Utilities Commission Act*.

B.C. Reg. 245/2006 directs the BC Utilities Commission (BCUC), in regulating BC Hydro, to use the criterion that BC Hydro is to achieve electricity self sufficiency by 2016 and each year thereafter, and is to exceed self sufficiency by at least 3,000 gigawatt hours per year as soon as practicable but no later than 2026.

To become self sufficient, BC Hydro will need to be able to acquire sufficient energy and capacity solely from electricity generating facilities within British Columbia to allow it to meet all of its electricity supply obligations. For the purpose of evaluating BC Hydro's supply portfolio, the BCUC is to assume the most adverse critical water conditions, meaning that BC Hydro's fleet of hydroelectric generating facilities will contribute, for planning purposes, only about 42,600 gigawatt hours per year.

Commenters are lining up in support of or opposition to the self sufficiency policy. Supporters favour the potential investment, energy security and trade benefits of abundant made-in-BC generation, while opponents claim the policy could cost BC Hydro's ratepayers as much as $650 million (on a present value basis) compared to a lowest system cost approach to resource planning.

Wood Waste Energy Call

The 2007 Energy Plan also calls for BC Hydro to pursue a call for electricity targeted to technologies that burn sawmill residue, logging debris and timber affected by the mountain pine beetle infestation. In a recent regulation (B.C. Reg. 245/2006) the Province provided greater clarity with respect to the sources of wood biomass that will be permissible for the call and

provided direction to the BCUC with respect to its review of the contracts BC Hydro will enter into as a result of the call.

The regulation defines "wood biomass" as: (a) wood residue within the meaning of the *Forest Act*; (b) wood debris from logging, construction or demolition operations; (c) organic residues from pulp and paper production processes; and (d) timber, within the meaning of the *Forest Act*, infested by the mountain pine beetle. A project that will generate electricity from such wood biomass will be eligible to be bid into the BC Hydro call. BC Hydro issued a request for expressions of interest in March 2007 to identify potential wood biomass projects and proponents, and expects to issue draft term sheets for the call in the near future.

CPCN granted for Revelstoke Unit 5

On July 12, 2007 the BCUC granted BC Hydro a CPCN to install and operate a new 500 MW generating unit at the Revelstoke Dam and Generating Station which is located near the City of Revelstoke. BC Hydro estimates the project will cost between $280 and $350 million and expects to have the generator in service in time for the 2010/2011 winter peak load season.

A significant issue in the BCUC review process and decision was whether it is necessary for the BCUC to consider whether or not the duty of the Crown to consult and, if necessary, accommodate First Nations has been met.

The BCUC made the following conclusion on this important issue:

"The Commission Panel disagrees… [that it] needs to consider evidence relevant to First Nations consultation so as to determine whether or not the duty of the Crown to consult and, if necessary, accommodate has been met. Evidence relevant to First Nations consultation may be relevant for the same purpose that the Commission often considers evidence of consultation with other stakeholders. Generally, insufficient evidence of consultation, including with First Nations, is not determinative of matters before the Commission."

The BCUC concluded that it is not necessary for it to consider whether there has been adequate First Nations consultation or accommodation because the regulatory scheme established by government ensures that First Nations interests are considered during the review process under the *Environmental Assessment Act*.

First Nations may be active participants in BCUC processes; however, the BCUC will consider evidence of consultation with First Nations as relevant for the same purpose as evidence of consultation with other stakeholders. That is, the BCUC will consider the evidence as relevant to its assessment of the overall risks associated with the project, but will not consider whether the duty of the Crown has been met. This is an important determination that should help to stream line the regulatory review of the major transmission and generation projects that are expected over the next decade.

ALBERTA

MSA Power to Compel Evidence Confirmed by Court

On July 5, 2007, the Alberta Court of Queen's Bench issued a decision (*Alberta (MSA) v. Enmax Energy Corporation*, 2007 ABQB 309) with respect to an application brought by the Alberta Market Surveillance Administrator (MSA) to compel employees of Enmax Energy Corporation and Enmax Marketing Inc. (Enmax) to answer questions in connection with an MSA investigation of behaviour Enmax may have been engaging in that appeared to be contrary to the MSA's intertie conduct guidelines.

In response to the MSA application, Enmax argued that the MSA does not have authority under *Electric Utilities Act* to bring the application and the Court does not have the power to compel the employees to

answer the questions. Enmax also asked the Court to make sealing and *in camera* orders regarding any information produced during the Court proceeding or the MSA investigation because of commercial sensitivity.

The Court's decision provides a number of interesting points for market participants. The Court concluded that although the literal wording of the *Electric Utilities Act* does not explicitly permit the MSA to apply to the Court to compel answers, the Act should be interpreted as providing the MSA with a means to enforce compliance with reasonable inquiries to best ensure attainment of the broad mandate of the MSA to investigate market activity.

The Court also made a number of interesting comments with respect to Enmax's contention that any information produced during the course of the investigation should remain confidential. The Court recognized that during the investigation stages the MSA maintains all information in confidence, subject to the information being further used in any related tribunal hearings or other processes resulting from its investigations. The Court disagreed with Enmax's argument that the MSA could only make information public in the few instances where the *Electric Utilities Act* specifically permits it. The Court did not view the MSA's mandate in such a restrictive manner, implying that the MSA may be able to make information public in circumstances the MSA considers appropriate.

The Court also commented on Enmax's contention that disclosure of the information asserted to be commercially sensitive would significantly harm the competitive position of Enmax resulting in undue loss and irreparable harm. The Court noted that it was not enough to simply claim harm and undue loss:

"…general assertions ought not to be the bases for a shielding order without appropriate underlying evidence. It is certainly not readily apparent to me how Enmax's competitive position would be harmed by the public knowing that there is an ongoing investigation relating to importation into Alberta of electricity and that Enmax is one of those who imports electricity. In my view, that adds little to the already published reports on the subject which were before me. On the other hand, I agree that there is a reasonable expectation that the MSA will not disclose the information uncovered unless it is unreasonably necessary to fulfill its mandate. That determination is the proper subject of the MSA's discretion which must be exercised in accordance with section 50 of the Act."

The Court decided that because the MSA's practices and procedures all reflect the policy that a matter will stay confidential during the investigation stage it was appropriate to maintain confidentiality given the particulars of the application before the Court. The Court further remarked that it is up to the MSA to decide whether its mandate is best served by making information public in accordance with the MSA's duty to act fairly and responsibly.

NORTHWEST TERRITORIES

Government of Canada and Dene Tha' First Nation Reach Settlement Agreement

On July 23, 2007, Canada and the Dene Tha' First Nation (DTFN) announced the signing of an agreement that resolves the DTFN's concerns regarding the Mackenzie Gas Project (MGP).

In the spring of 2005 the DTFN initiated a judicial review application in Federal Court asserting that they had been left out of discussions surrounding the development of the Cooperation Plan (2001/02) and the creation of the Joint Review Panel (JRP) established to review the MGP, and that all subsequent Crown consultation with them was therefore inadequate.

On November 10, 2006, the Federal Court declared that the Crown was in breach of its duty to consult with

the DTFN and stayed the proceedings of the JRP in matters that may affect the DTFN. The stay was later lifted at the request of all parties, but the JRP was still enjoined from issuing its final report. On December 5, 2006, Canada filed a Notice of Appeal with the Federal Court of Appeal.

Under the July 23 settlement agreement Canada will provide $25 million to the DTFN to assist the DTFN to address the socio-economic, cultural and heritage impacts of the construction and operation phases of the MGP. The DTFN agreed to end further litigation against Canada which would prevent or delay development of the MGP. In an interesting twist on the usual form of settlement agreement, the parties made the Appeal proceedings independent of the settlement agreement. The appeal will continue in the interest of seeking greater clarity on the law of Aboriginal consultation.

Exploration Rights Awarded to Majors in Mackenzie Delta/Beaufort Sea

In our spring 2007 newsletter we reported that the Minister of Indian Affairs and Northern Development recently conducted a call for bids for petroleum exploration rights on three parcels in the Mackenzie Delta/Beaufort Sea region of Northern Canada. The call for bids closed on July 17, 2007. The largest bid was for Parcel BS-1 – $585 million from Imperial Oil Resources Ventures Limited and Exxonmobil Canada Properties – by far the largest amount ever offered for a single exploration license on or off shore in Northern Canada (the next largest bid was $75 million from Anderson Exploration Ltd. in 2000). The five-year license covers 205,321 hectares approximately 120 kilometres offshore, and will approximately double Imperial's holdings in the Beaufort Sea.

ConocoPhillips Canada Resources Corp. secured a license to explore a 103,711 hectare offshore parcel (Parcel BS-2) for slightly over $12 million. The third parcel (Parcel BS-3) went to Chevron Canada Ltd. for approximately $1 million.

The licenses require each of the licensees to drill at least one well in the next five years. If the terms of the license are met, the licensee can extend it for another four years.

For further information regarding the oil and gas licensing process in Northern Canada, please see "A Regulatory Road Map: Successfully Navigating Oil and Gas Licensing Regimes in the North", a paper authored by Lawson Lundell LLP lawyers Keith Bergner and Mariana Storoni and presented to the Canada Institute's Oil and Gas Summit in Calgary. A copy of the paper is available at http://www.lawsonlundell.com/resources/Oil.Gas.Licensing.Regimes.North.2007.pdf.

VANCOUVER
1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
Canada V6C 3L2
Telephone 604.685.3456
Facsimile 604.669.1620

CALGARY
3700, 205 – 5th Avenue SW
Bow Valley Square 2
Calgary, Alberta
Canada T2P 2V7
Telephone 403.269.6900
Facsimile 403.269.9494

YELLOWKNIFE
P.O. Box 818
200, 4915 - 48 Street
Yellowknife, NT
Canada X1A 2N6
Telephone 867.669.5500
Toll Free 1.888.465.7608
Facsimile 867.920.2206

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