LAWSON LUNDELL
BARRISTERS AND SOLICITORS

WESTERN CANADIAN BUSINESS LAW

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TABLE OF CONTENTS

Introduction 1
National 1
Regional 1
British Columbia 2
Alberta 3
Northwest Territories 4
The Yukon 4

INTRODUCTION

Welcome to Lawson Lundell's Energy Law Newsletter. Written and published quarterly by Lawson Lundell lawyers, the newsletter is intended to inform readers of recent energy issues relevant to Western and Northern Canada. For further information about this newsletter or Lawson Lundell, please contact Chris Sanderson (Vancouver office -contact information on back page) or visit our web site at www.lawsonlundell.com.

NATIONAL

National Energy Board Advisory on the *Species at Risk Act*

The National Energy Board recently issued an advisory to companies under NEB jurisdiction to become familiar with the *Species at Risk Act* ("SARA") and, specifically, with those provisions of the act that would apply to future applications made to the NEB. Planned amendments to the NEB's *Guidelines for Filing Requirements* (1995) will include a reminder to applicants to consider SARA and its requirements as related to NEB applications.

SARA sets out protective measures for those species identified as being at risk (extirpated, endangered, threatened or species of special concern) and for identified critical habitat. Particular provisions brought into force in June of 2003 include SARA's listing provisions and provisions governing the Committee on the Status of Endangered Wildlife in Canada, a committee of wildlife scientists and experts that will recommend on the listing of species at risk. However, certain other provisions including SARA's general prohibitions on killing listed species and destroying listed species' critical habitat, as well as SARA's enforcement and offence provisions, will not be in force until June 1, 2004.

REGIONAL

TransCanada Funds MacKenzie Valley Pipeline

The Aboriginal Pipeline Group (APG) announced a funding agreement on June 18 at the annual Inuvik Petroleum Show with TransCanada Pipelines and the producers' consortium (Imperial, Conoco-Phillips, Shell and ExxonMobil). Under the agreement TransCanada will lend $80 million to the APG to cover its costs during the initial regulatory processes of the proposed MacKenzie Valley natural gas pipeline, and agrees to expand its system to just south of the Alberta- NWT border. In exchange TransCanada acquired various options to acquire interests in the project (although through its ownership of Foothills Pipelines it is also a strong proponent of an Alaska natural gas pipeline project).

Concurrently with the announcement of the funding agreement, Imperial announced on behalf of the producers' consortium that a Preliminary Information Package was being submitted to the various regulatory authorities pursuant to the Cooperation Plan developed in 2002 to coordinate and streamline the regulatory processes the project will face.

FERC Enquiries Into California Power Crisis

On June 11 Michael Kergin, Canada's ambassador to the US, wrote to FERC chairman Pat Wood urging that any show-cause hearing regarding allegations of market manipulation ought to provide for full evidentiary hearings.

On June 25 FERC apparently heeded the request, issuing show cause orders to over 60 power trading companies (virtually every company that traded power in California in 2000-01), but allowing for full evidentiary hearings before an administrative law judge. Canadian companies affected include TransAlta and Powerex. Any company shown to have violated the very broadly worded anti-gaming provisions of the CAL-ISO or CAL-PX tariffs will be required to disgorge any profits resulting from such violations, in addition to refunds owed in the separate but related FERC refund proceeding.

BRITISH COLUMBIA

BC *Transmission Corporation Act*

The British Columbia legislature enacted Bill 39, the *Transmission Corporation Act*, on May 29, 2003. The new Act will enable the establishment of British Columbia Transmission Corporation (BCTC), a new government-owned company that will operate BC Hydro's high voltage transmission grid independent from BC Hydro. BCTC will also be responsible for transmission system planning. Core transmission assets, including transmission towers, poles and lines, will continue to be owned by BC Hydro.

The Act follows quickly on the heels of the BC government's Energy Plan, released in November 2002. The Energy Plan contemplates that BCTC will be responsible for ensuring there is adequate transmission capacity available to reliably supply domestic and export needs and that all electricity buyers and suppliers have non-discriminatory access to this capacity.

The Act requires BCTC to file its first tariff by December 2004. Until then BCTC will operate the transmission system on BC Hydro's behalf pursuant to agreements between them, but transmission service will continue to be provided by BC Hydro under the existing tariff.

Amendments to BC *Utilities Commission Act*

Bill 40, which provides for significant amendments to the *Utilities Commission Act*, was enacted on May 27, 2003.

The amended Act directs the BCUC, when setting rates, to allow public utilities a fair return on Demand Side Management expenditures, and expenditures that increase efficiency or enhance performance. The amended Act also expressly empowers the BCUC to set performance-based rates, and gives the BCUC clearer authority to hold written hearings and use alternative dispute resolution methods.

The BCUC is also given new powers to oversee public utility capital expenditures, energy acquisition, and demand side management plans. The BCUC may determine whether the expenditures set out in those plans are in the interests of existing and future customers and the manner in which the expenditures should be recovered in the public utility's rates.

Significantly, the amended Act provides, for the first time, retail access to "low volume" natural gas consumers, subject to BCUC rules and licensing (yet to be developed). "Low volume consumers" are expected to include residential and small commercial consumers.

The BCUC will also be re-assigned powers for declaring and dealing with common carriers, common purchasers and common processors of oil and gas, previously within the jurisdiction of the BC Oil and Gas Commission.

Finally, and of particular interest to independent power producers, the provisions of the Act that required a person to obtain an Energy Removal Certificate before removing an energy resource produced in British Columbia from the province have been repealed. However, the definition of "energy supply contract" is broadened, making more wholesale electricity sale agreements subject to BCUC review than has been the case previously. Moreover, exportation of oil, gas or electricity from Canada will still require federal approval under the *National Energy Board Act*.

ALBERTA

ISO Transition

The legislative transition towards an Independent System Operator ("ISO") is now complete. The new *Electric Utilities Act* passed by the Alberta Legislature in late March came into force on June 1, 2003, establishing the Alberta Electric System Operator ("AESO") as the new ISO. The new legislation makes key changes to Alberta's electrical industry structure, effectively integrating the functions of the power pool, power pool administrator and system controller with those of the transmission administrator into a single statutory corporate entity. The new Act also creates separate corporations and governance for the Market Surveillance Administrator and the Balancing Pool. AESO has consolidated the existing Power Pool Rules, Settlement System Code, Power Pool Code and Transmission Administrator Operating Policies (TAOPs) into a single ISO Rules document. While the intent of the initial consolidation was not to effect substantive amendments to any of the provisions of the current rules, AESO has declared that it intends a more substantive rewrite of the new ISO rules shortly.

New Transmission Development Policy

In an attempt to provide public policy guidance and to encourage timely development of transmission facility infrastructure in Alberta, in early April the Alberta government issued a discussion paper proposing a new transmission development policy for the province. Seeking to ensure that adequate transmission capacity is in place so that transmission does not become a barrier to development, the draft policy proposes that load customers would be wholly responsible for the embedded costs of transmission service. Under the new proposal, generators will be responsible only for their local interconnection costs and the incremental costs of location-based, short-run marginal losses. This proposal in effect reverses the zonal interconnection charge portion of the Alberta Energy and Utilities Board's Congestion Management decision issued late last year (EUB Decision 2002-099). The proposed policy, which was originally intended to form part of the body of legislation brought into force on June 1, 2003, has not yet been made law.

New Climate Change and Emissions Management Legislation Introduced

The Alberta Government has re-introduced climate change and emissions management legislation. Originally introduced in November 2002 in response to the Federal government's push to ratify the Kyoto Protocol, Bill 32 died on the order paper at the close of the 2002 legislative session. New Climate Change and Emissions Management legislation was introduced in the current session as Bill 37, and was adjourned at Second Reading on April 28, 2003. Although similar in nature to Bill 32, the new draft legislation neither explicitly declares carbon dioxide and methane to be natural resources, nor establishes a system of emission trading. Finally, the new draft legislation no longer declares that the gas emission targets established under the legislation are the only emission targets in effect in Alberta. While the proposed legislation provides for the establishment of an emissions management fund and introduces the concept of emission offsets, credits and sink rights, the bulk of the substantive detail will be determined by regulation. The Alberta government anticipates passing the Climate Change and Emissions Management legislation during the Legislature's Fall session.

AEUB Holds Consultation Meeting Regarding Proposed Bitumen Conservation Policy

Concerned about the conservation of bitumen in oil sands areas of the province where the bitumen is associated with an overlying gas zone, the Board issued a draft policy on June 3, 2003 regarding bitumen conservation. Interested parties were provided with an opportunity to provide submissions with respect to the proposed policy to the Board at a two-day consultation meeting held in early July. Generally, the Board believes that gas production from some grandfathered wells (completed before July 1998) presents an unacceptable risk to future thermal bitumen recovery, and that generally Wabiskaw-McMurray gas pools are at an advanced stage of depletion. In the Board's view, immediate action is required to mitigate further risk to

thermal bitumen recovery. As a result, the Board has proposed to shut in gas production from the Wabiskaw-McMurray in a new reduced application area effective August 1, 2003; to complete a detailed review of shut-in gas production within the new application area to allow the production of nonassociated gas; and to allow gas production without application from the Athabasca Wabiskaw-McMurray in wells outside the new application area effective immediately. The Board has not yet issued its final policy with respect to bitumen conservation.

NORTHWEST TERRITORIES

NWT Public Utilities Board Rules on General Rate Application

On June 26, 2003, the NWT PUB issued its rate design decision in the NWT Power Corporation's General Rate Application. The PUB rejected Territory wide postage stamp rates in favour of community-based rates. Pursuant to the decision the NWT Power Corporation may not increase rates by more than 15% on a 105% cost of service limit at the community level. The NWT Power Corporation is also obliged to make any potential rate decrease equally available to all rate classes with a revenue to cost ratio over 100%. The decision also approved as final rates the interim rates and shortfall riders approved by the PUB in Decisions 5-2001, 6-2002, 8-2002 and 9 –2002.

THE YUKON

Yukon Government Signs Bilateral Agreement with Kaska Nation

On May 9, the Yukon Government and the Kaska Nation signed a bilateral agreement intended to facilitate resource development in the Kaska traditional territory in southeast Yukon. Under the agreement, the Yukon government will not agree to any significant dispositions or development of lands or resources in the region without the consent of the Kaska. This would include dispositions of oil and gas rights, forestry tenures and rights to other resources. The parties will also establish measures to ensure that the Kaska share revenues and benefits from exploration and resource development within the Kaska traditional territory.

The agreement, which has proved to be controversial in the Yukon, has a two-year term. It is intended to be an interim arrangement pending negotiation of a final land claim agreement and self government agreement for the Kaska in the Yukon.

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**FEATURE ARTICLE:
AMENDMENTS TO FEDERAL ENVIRONMENTAL ASSESSMENT REGULATIONS
FOR OFFSHORE OIL AND GAS**

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In most of the Canadian offshore, the National Energy Board ("NEB") is the primary regulator and is required to conduct *Canadian Environmental Assessment Act* ("CEAA") assessments for offshore oil and gas exploration and production projects and before issuing a lease for federal lands to allow for the extraction of oil and gas by a physical work. Generally, CEAA requires federal authorities to conduct an environmental assessment (either a screening, comprehensive study, or panel review) in prescribed circumstances.

This regulatory scheme would apply if offshore oil and gas development on the West Coast of Canada were to proceed. However, it is widely thought that B.C. offshore oil and gas development will probably involve establishment of a special regulatory board similar to those overseeing offshore projects on the East Coast. In Newfoundland and Nova Scotia, offshore petroleum boards have been established to manage oil and gas on behalf of the federal and provincial governments, and the main regulatory regime applying to offshore oil and gas development anywhere else in Canada does not apply in the offshore board areas. The CEAA applies in the offshore board areas, but the regulations do not require the offshore boards to conduct an environmental assessment for exploration and production projects – although they do require an environmental assessment before issuing a lease for federal lands to allow for the extraction of oil and gas by a physical work.

On April 19, 2003, the federal government gazetted a notice of proposed regulations amending the *Inclusion List Regulations* and the *Law List Regulations* to expand the coverage of the CEAA to include East Coast offshore oil and gas exploration activities. The Regulatory Impact Statement released with the notice states that the proposed amendments "…would allow the establishment of a coherent federal EA regime for oil and gas projects throughout the Canadian offshore." The federal government appears to intend full application of CEAA in all areas of the Canadian offshore, including where there are special federal-provincial management accords for regulation of offshore oil and gas development.

The *Comprehensive Study List Regulations* are also proposed for amendment to clarify the types of projects that will be subject to a comprehensive study in "all the offshore regions of Canada where offshore oil and gas activities are permitted".

<u>Present application of CEAA to Offshore Oil and Gas Regulation</u>

Except for the Newfoundland and Nova Scotia offshore areas, at present the NEB is required to conduct CEAA assessments for offshore oil and gas exploration and production projects and before issuing a lease for federal lands to allow for the extraction of oil and gas by a physical work. This requirement arises from the inclusion of certain provisions of the *Canada Oil and Gas Operations Act*, which is administered by the NEB, in the *Inclusion List Regulations* and the *Law List Regulations*. The NEB also regulates and must conduct CEAA assessments of proposed pipelines that are required for Canadian offshore projects.

In Newfoundland and Nova Scotia, offshore petroleum boards have been established to manage oil and gas on behalf of the federal and provincial governments. Although both offshore boards are federal authorities under CEAA, the regulations only require the offshore boards to carry out a CEAA assessment before issuing a lease for federal lands to allow the extraction of oil and gas by a physical work in their respective offshore regions.

Effect of the Proposed Amendments

The new amendments would add the requirement for offshore boards to carry out CEAA assessments before issuing authorizations for physical activities relating to: a marine or freshwater seismic survey; an exploratory drilling program; the production of offshore oil and gas; or establishing a development plan for a pool or field of oil or gas that requires the approval of an offshore board.

The amendments to the *Comprehensive Study List Regulations* would define the term "offshore" to mean all parts of the submarine areas under the jurisdiction of the NEB, the Canada-Newfoundland Offshore Energy Board, or the Canada-Nova Scotia Offshore Energy Board. The amendments would clarify the assessment requirements for different components of offshore oil and gas projects. For example, certain new satellite production platforms, pipeline facilities and exploratory drilling projects that would be located entirely in a study area previously reviewed in a comprehensive study or panel review under CEAA or its predecessor Guidelines Order, would not be required to be assessed by a comprehensive study, but such projects would need to be assessed by a screening.

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