Blake, Cassels & Graydon LLP November 2010

Blakes Bulletin

CleanTech/Environmental

# Alberta Releases New Bill Regarding Carbon Capture and Storage

ABRAM AVERBACH, MATT FLYNN AND DUFFERIN HARPER

## INTRODUCTION

Reaffirming Alberta's position as a world leader with respect to the development of commercially viable Carbon Capture and Storage (CCS), the *Carbon Capture Storage Statutes Amendment Act, 2010* (the CCS Act) has passed the first reading of the Alberta legislature. The CCS Act, if ultimately proclaimed, will amend existing environmental and oil and gas related legislation and is a positive step towards establishing a clear legal and regulatory CCS framework. Coupled with the existing C$2-billion dollar carbon capture and storage fund founded by Alberta to promote the province's first large-scale commercial CCS pilot projects, the CCS Act confirms that CCS remains an integral part of the Alberta government's strategy in meeting its goal of reducing greenhouse gas (GHG) emissions by 50% by 2050.

The CCS Act represents one of the first formalized attempts in North America to regulate CCS and appears to address many of the concerns and considerations voiced by industry and environmental organizations with respect to implementing a manageable regulatory framework.

Highlights of the CCS Act include:

- clarification over ownership of the pore space into which the sequestered carbon dioxide ($CO_2$) is injected;
- allocation of long-term liability for the intended permanent sequestration of the $CO_2$;
- addressing the risk of the 'disappearing corporation'; and
- the creation of a post-closure stewardship fund.

These issues are discussed more fully below.

## OWNERSHIP OF PORE SPACE

CCS requires the injection of produced $CO_2$ into underground formations which are then sealed on a permanent basis. Logistically, this situation poses a difficult situation for Alberta, as grants to minerals or other subsurface rights under existing legislation do not contemplate how the pore space of the subsurface area is to be treated (which is where the captured $CO_2$ is to be stored). Further, pursuant to s. 57 of the *Mines and Minerals Act*, the owner of petroleum and natural gas rights also owns the rights to the underground storage.

The CCS Act will amend the *Mines and Minerals Act* to include a provision declaring that no grant from the Crown, either in land or mines and minerals, operates or has operated as a conveyance of the title to the pore space. This amending provision will be deemed an exception to s. 61.1 of the *Land Titles Act*, meaning that this declaration will not constitute an expropriation. Accordingly, the Crown will not be required to compensate any landowners or rights holders for the loss of the pore space.

## LONG-TERM LIABILITY

From an industry perspective, CCS represents an opportunity to reduce GHG emissions and therefore mitigate penalties imposed by Alberta legislation upon facilities within the province that emit greater than 100,000 tonnes of $CO_2e$ per year.

Since 2007, Alberta has legislated reporting requirements and emissions reduction requirements for facilities operating within the province under the *Climate Change and Emissions Management Act* (CCEMA) including the *Specified Gas Emitters Regulation* and the *Specified Gas Reporting Regulation*, both of which have been enacted under the CCEMA.

$CO_2e$ is calculated by converting all of the emissions of certain specified gases with known global warming potentials into the equivalent global warming potential associated with $CO_2$. The specified gases include methane ($CH_4$), nitrous oxide ($N_2O$), sulphur hexafluoride,

CONT'D ON PAGE 2

©2010 Blake, Cassels & Graydon LLP

CONT'D FROM PAGE 1

various hydrofluorocarbons (HFCs) and various perfluorocarbons (PFCs). Each of the specified gases have different global warming potentials. For example, one molecule of methane has the global warming potential equivalent to 21 molecules of $CO_2$.

However, poorly regulated CCS could also represent a source of potentially eternal and unquantifiable liability. In CCS, the captured $CO_2$ is intended to be sequestered forever. Without clear legal parameters, the liability of a company performing CCS could be endless, given that most environmental legislation removes usual limitation periods that would otherwise restrict the duration of such liability.

The CCS Act attempts to alleviate this concern by providing some regulatory certainty surrounding long-term liability. It proposes to amend the *Mines and Minerals Act* to allow for the issuance of "closure certificates" upon the completion of a CCS project. Upon the issuance of a closure certificate, the province becomes the owner of the captured $CO_2$, assuming all obligations of the party that injected it into the ground (the lessee), including:

- obligations as an owner and licensee under the *Oil and Gas Conservation Act* of the wells and facilities covered by the agreement that authorized the injection of the carbon dioxide;
- obligations as the person responsible for the injected captured carbon dioxide under the *Environmental Protection and Enhancement Act*;
- obligations as the operator under Part 6 of the *Environmental Protection and Enhancement Act* in respect of the land within the location of the agreement used by the lessee in relation to the injection of carbon dioxide; and
- obligations under the *Surface Rights Act*.

A closure certificate will be accompanied by a release of the lessee by the province. More remarkably, the province will also indemnify the lessee against liability for damages in an action in tort if liability arises in relation to an action or omission of the lessee occurring in the context of the initial permitted injection of $CO_2$.

In short, the issuance of a closure certificate results in the full-scale, permanent assumption by Alberta of all liabilities that may arise in relation to the injected $CO_2$, without any apparent ability for the government to re-open the certificate process. Quite arguably, the CCS Act and its closure certificate provisions represent one of the most significant transfers of liability to the province of any legislation in Alberta.

A closure certificate may only be issued if, among other things, the captured $CO_2$ is "behaving in a stable and predictable manner, with no significant risk of future leakage." This casts some doubt as to when the province may be fully satisfied to an extent that it will issue a closure certificate. It will be interesting to see if the government will adopt a process similar to that of Australia, which requires the expiration of a 15-year assurance period prior to the issuance of a closure certificate.

**THE PROBLEM OF THE "DISAPPEARING CORPORATION"**

A concern raised by many is the scenario where a lessee performing CCS goes bankrupt or otherwise "disappears" prior to completing its injection program or receiving a closure certificate. The CCS Act addresses this scenario in two ways.

First, the province may assume ownership of captured $CO_2$ where the lessee "ceases to exist". It should be noted, however, that this assumption is permissive, rather than mandatory, and it is yet to be seen if the government will in fact be keen to accept such ownership.

Second, the Energy Resources Conservation Board (ERCB) may also deem a lessee to be a "defaulting working interest participant" where such lessee:

(a) has an obligation under the *Oil and Gas Conservation Act* to contribute toward suspension costs, abandonment costs or related reclamation costs;

(b) has not contributed to those costs as required; and

(c) in the opinion of the ERCB, does not exist, cannot be located or does not have the financial means to contribute to those costs as required by the CCS Act.

In those circumstances, the province may make payment to a person in respect of a defaulting working interest participant's share of suspension, abandonment or reclamation costs and the defaulting working interest participant remains liable in respect of those costs.

CONT'D ON PAGE 3


©2010 Blake, Cassels & Graydon LLP

CONT'D FROM PAGE 2

## THE POST-CLOSURE STEWARDSHIP FUND

A debate that has yet to occur involves whether the taxpayer views it as appropriate to be the one taking on the liability of sequestered $CO_2$ as a result of the province's assumption of risk through the closure certificate process discussed above. The sensitivity of this issue will no doubt be exacerbated by the fact that the province has already committed C$2-billion dollars to developing CCS technology through the carbon capture and storage fund, and the fact that industry may in addition make some degree of profit (and/or mitigate a penalty imposed under the CCEMA) through the use of CCS.

In this regard, the CCS Act does establish a Post-Closure Stewardship Fund to be funded by industry participants performing CCS which may be used for:

- the purposes of monitoring the behaviour of captured $CO_2$;
- the purposes of fulfilling any obligations that are assumed by the province upon issuance of a closure certificate;
- the purposes of paying for suspension costs, abandonment costs or related reclamation or remediation costs in respect of orphaned CCS facilities where the work is carried out by an entity other than the lessee;
- the purposes of paying for costs incurred in pursuing a non-paying lessee for reimbursement for the suspension costs, abandonment costs or related reclamation or remediation costs referred to above; and
- any other purpose prescribed in the regulations promulgated under the CCS Act.

## CONCLUSION

The Alberta government continues to play a leading international role in pursuing the commercially viable implementation of CCS. To make this pursuit real, a clear regulatory framework needs to be established. The CCS Act strives to do that and, at first glance, does it fairly well, with the exception of lingering concern regarding the transfer of liability onto the taxpayers.

For more information and insight into the regulation of GHG emissions and the carbon market in Alberta and Canada, visit our Publications, CleanTech page.

For further information, please contact:

Abram Averbach 403-260-9632
Matt Flynn 403-260-9693
Dufferin Harper 403-260-9710

or a member of our CleanTech Group or our Environmental Group.



Blakes periodically provides materials on our services and developments in the law to interested persons. If you do not wish to receive further bulletins, please click **here**. For additional information on our privacy practices, please contact us at **privacyofficer@blakes.com**. *Blakes Bulletin* is intended for informational purposes only and does not create a lawyer-client relationship. The transmission of this information does not suggest Blakes or any of its lawyers are practising law of any jurisdiction other than Canada. The information provided in this bulletin is summary in nature and does not constitute legal advice. We would be pleased to provide additional details or advice about specific situations if desired. For permission to reprint articles, please contact Blakes Marketing Department at 416-863-2403 or **lynn.spencer@blakes.com**.©2010 Blake, Cassels & Graydon LLP.