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COP 7 Sets Stage for Implementation of Kyoto Protocol

The seventh session of the conference of the parties (**COP 7**) to the UN Framework Convention on Climate Change (**UNFCCC**) in Marrakech last November ended with significant progress on the detailed rules necessary to proceed with implementation of the Kyoto Protocol (**KP**). The agreement reached among the parties, which resolves and clarifies many of the outstanding issues and ambiguities left from the political agreement reached at the continuation of COP 6 in Bonn last July, sets the stage for developed nations (**Annex I parties**) to now consider ratification of the KP. Prime Minister Chrétien has indicated that it is his objective to have Canada make its decision on ratification this year.

Notable results from the COP 7 agreement include:

- ***Sink Units*** - Creation of "Removal Units" or "**RMUs**", a credit unit made available to track the elimination of greenhouse gases through the use of carbon sinks. This will facilitate the trading of emission reductions generated through carbon sinks.

- ***Private Sector Participation*** - Confirmation that Annex I parties can authorize legal entities, including the private sector, to participate in emission reduction projects in developing nations through the Clean Development Mechanism (**CDM**) or in Annex I nations through Joint Implementation (**JI**) projects, and to trade the resulting emission reduction units (**CERs** and **ERUs**, respectively). Annex I parties may also authorize legal entities to trade RMUs and the units associated with each Annex I party's permitted emissions under the KP (**AAUs**). Legal entities may only engage in these activities, however, if their authorizing Annex I party meets the eligibility criteria to also participate in those activities at the time. This may result in delays for private sector trades pending receipt of confirmation that the appropriate authorizing Annex I parties were also eligible to trade at the time.

- ***Annex I Party Liability Continues*** - Annex I parties who authorize legal entities to participate in CDM or JI projects, or to trade CERs, ERUs, AAUs or RMUs will nevertheless remain responsible for meeting their own KP commitments. This will likely result in significant safeguards being included in any domestic policy or regulatory regime which permits private sector trading, which in turn may mean delays or impediments to private sector trading.

- ***Banking*** - Confirmation that AAUs can be banked without limit for use in subsequent compliance periods (following the initial 2008-2012 compliance period provided for in the KP), CERs and ERUs can be banked up to a maximum amount equal to

2.5% of the party's initial AAU allocation, and RMUs cannot be banked. This may result in some decrease in demand for CERs, ERUs and RMUs, but likely the only significant effects will occur with respect to RMUs, especially near the end of the initial compliance period.

- ***Fungibility*** - Confirmation that all units are fungible (i.e. AAUs, CERs, ERUs and RMUs may all be used interchangeably for KP compliance purposes).

- ***JI / CDM Credit Timing*** - Emission reduction projects starting as of January 1, 2000, may be eligible for registration as a JI or CDM project. If accepted, CDM projects could generate CERs from as early as January 1, 2000, even if the project is not registered until after that date. JI projects, however, can only generate ERUs from and after 2008. This may result in development delays for JI projects until closer to 2008.

Despite this progress to clarify the KP's rules, the decision on whether to ratify the KP will not be easy. Many of the CDM and JI details (such as the procedures and eligibility requirements for projects, host country approval requirements and administrative cost levies) have yet to be finally determined. The way in which these and other outstanding issues are resolved will have a material impact on whether KP's flexible mechanisms will facilitate compliance with KP commitments at a reasonable cost. A decision to ratify the KP before agreement on these critical details is reached will require considerable political will and a leap of faith from Annex I parties. While the burden of KP commitments trickles down to the private sector (as Annex I parties develop and implement domestic policy and regulatory regimes to achieve KP compliance), business and industry may be holding one big collective breath in the hope that, once all of the details become clear, KP commitments can be achieved economically.

For further information on COP 7, the KP and emissions trading, please call **Ron Ezekiel** at 604 631 4708.

Federal Legislative Update: SARA & CNMCAA

In 2001, two significant pieces of Federal environmental legislation made progress in Parliament.

On December 3, 2001, the Standing Committee on Environment and Sustainable Development delivered its report on Bill C-5, the *Species at Risk Act* ("SARA") to the House of Commons. The committee recommended more than 100 amendments. The House has yet to debate the Report.

With much less fanfare, the House of Commons adopted amendments recommended by the Standing Committee on Canadian Heritage and passed Bill C-10, the *Canada National Marine Conservation Areas Act* ("CNMCAA"), on third reading on November 27, 2001. The Senate gave first reading to the bill the next day. The CNMCAA provides for the designation of "Marine Conservation Areas". It then generally prohibits activity which would tend to degrade the marine environment, and specifically prohibits exploration for hydrocarbons, in those areas. As of yet, no areas have been specified in the Schedules to Bill C-10.

For further information on these Acts, please call **Rob Lonergan** at 604 631 4718.

Recovering Remediation Costs: Mixed Signals from the Court

The BC Supreme Court continues to interpret the contaminated sites cost recovery remedy in a highly inconsistent manner. Two recent decisions should be considered both by persons seeking recovery of remediation costs or those defending against such actions.

The Court's September 2001 *Seabright* decision departed from two *Swamy* decisions which held that persons seeking recovery must first obtain numerous decisions from the provincial regulator before the claim is ready to be heard in court. The *Swamy* decisions raised numerous practical and financial concerns for parties who wish to independently remediate and obtain contributions from previous owners

and operators. *Seabright* provided a measure of relief for persons seeking recovery. The Court in *Seabright* stated that, to have its case heard, a plaintiff needs only to demonstrate that the regulator had expressly or impliedly recognized that the site was contaminated prior to remediation. That is, the plaintiff in *Seabright* would not have to obtain the regulator's decisions on, for example, who is "responsible for remediation" and allocation of liability (as called for in the Swamy analysis).

A month later, the Court released the *Workshop Holdings* decision which simply adopted the *Swamy* approach without referring to the *Seabright* decision. The facts in *Workshop Holdings* and *Seabright* were very similar. In both cases, the plaintiff had remediated independently but had in the process received confirmation from the regulator that the site had been contaminated. Nonetheless, the Court in *Workshop Holdings* dismissed the plaintiff's cost recovery action.

It now appears that the Court of Appeal will have the next say. The Seabright appeal will be heard in April. That Court of Appeal decision will serve as primary guidance for cost recovery actions in BC.

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