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DUTY TO CONSULT APPLIES TO MODERN LAND CLAIM AGREEMENTS: THE SUPREME COURT OF CANADA'S *LITTLE SALMON* CASE

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The Supreme Court of Canada recently affirmed that the duty to consult will exist even in the context of a modern treaty, but it is likely the duty will be at the low end of the spectrum. In *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, Justice Binnie, writing for the majority of the Court (decision was a 7-2 split), concluded the duty to consult, grounded in the honour of the Crown, forms part of the legal framework which informs treaties – both modern and ancient.

Background

The Little Salmon/Carmacks First Nation ("LSCFN") finalized the Little Salmon/Carmacks First Nation Final Agreement (the "LSCFN Treaty") with the federal and territorial governments in 1996, and ratified the treaty in 1997. It is one of eleven treaties signed with the Yukon First Nations after an approximate twenty year negotiation process.

Inside

These modern treaties, unlike their historical predecessors, are comprehensive documents drafted to create some delineation of property ownership and governance rights and obligations, and place "Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency, and predictability" (para. 12). The Court emphasised the distinction, stating: "The eight pages of generalities in Treaty No. 8 in 1899 is not the equivalent of the 435 pages of the LSCFN Treaty almost a century later" (para. 52).

The LSCFN Treaty provided for the "cede, release and surrender" of all the First Nation's claims, rights, and titles to the federal government, but granted an express right to members of the First Nation to hunt and fish for subsistence on their traditional lands. This right was subject to the government's right to transfer surrendered Crown land.

At issue before the Court was an application by a Yukon resident named Larry Paulsen for an agricultural land grant of 65 hectares in an area about 40 kilometres north of Carmacks. The 65 hectares lay within LSCFN's traditional territory and also within Trapline #143, which spans some 21,400 hectares and is registered to a member of the LSCFN.

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After a pre-screening, the Paulsen application was forwarded to the Agricultural Land Application Review Committee ("LARC"), which includes First Nations membership. The Director of the Agriculture Branch of the territorial government posted a Public Notice of the Paulsen application and also notified the LSCFN directly, inviting written comments. In July 2004, LSCFN submitted a letter of opposition to the application, citing its effect on the trapline, timber harvesting, the availability of animals to hunt, and on adjacent cultural and heritage sites.

Although the First Nation had representation on the Committee, no LSCFN member attended the LARC meeting regarding the Paulsen application. Minutes demonstrate the attendees considered the concerns raised by the First Nation, finding the 65 hectares minimal, and noting compensation was available for diminishment of a member's trapline. The Director approved the Paulsen application in October 2004, without notifying the First Nation of his decision. Prior to his decision, members of the LSCFN met with representatives of the Agriculture Branch in September 2004 and expressed their general dissatisfaction that their concerns were not being taken seriously. The meeting did not specifically address the Paulsen application. In this context, Agriculture Branch officials had communicated to the LSCFN that they consult on such matters through LARC but they were not required by the LSCFN Treaty to consult on such issues. Meetings and discussions with the First Nation had been conducted, they said, only as a "courtesy". At the trial level the judge used this statement to conclude that any consultation that took place could not be sufficient – as it was only a "courtesy".

It was not until the summer of 2005, after writing numerous letters to the Yukon government expressing its opposition, that the LSCFN learned the Paulsen application had already been approved. Shortly thereafter, the First Nation launched this judicial review.

Majority Decision

Existence of the Duty

The territorial government argued that LSCFN's rights and obligations were fully confined to those in the Treaty, whereas LSCFN submitted the honour of the Crown is always at stake in all Crown dealings with Aboriginal peoples, and as *Haida Nation v. British Columbia (Minister of Forests)* and *Mikisew Cree Nation v. Canada (Minister of Canadian Heritage)* made clear, the duty to consult is grounded in the honour of the Crown and exists independent of treaties. The majority of the Supreme Court of Canada agreed with the First Nation, finding the honour of the Crown ensures reconciliation takes place, and reaf-

firmed its holding in *Mikisew* – that treaties are an important step toward reconciliation, but not the final step.

Justice Binnie, writing for seven of the nine judges, held that the duty to consult is external to the Treaty and is required to uphold the honour of the Crown, furthering the ultimate goal of reconciliation. The Crown cannot contract out of its duty of honourably dealing with Aboriginal people. Although it was undisputed that the LSCFN Treaty is the "entire agreement" between the parties, the Treaty does not exist in isolation: the duty to consult is part of the legal framework in which it is to be performed so as to uphold the honour of the Crown.

Justice Binnie acknowledged that it may be possible to negotiate a different mechanism within a treaty, other than consultation, stating: "the parties themselves may decide therein to exclude consultation altogether in defined situations and the decision to do so would be upheld by the courts where this outcome would be consistent with the maintenance of the honour of the Crown." However, the LSCFN Treaty does not describe the process of how Crown lands can be surrendered, or whether consultation would be required, and thus, the majority was unwilling to interpret that silence as implying no consultation was required.

The Court additionally clarified that the trapper himself was exercising a "derivative benefit based on the collective interests of the First Nation" (para. 35) and therefore was not entitled to be consulted individually.

Content of the Duty

The LSCFN Treaty itself set out the agreed elements of consultation as (a) sufficient notice, (b) reasonable time period to respond and an opportunity to be heard, and (c) full and fair consideration of the views presented. The majority found this formulation accords with the "lower end of the spectrum" described in *Haida* and *Mikisew*.

The LSCFN argued for more substantial consultation, including accommodation. The Court rejected such an approach, holding:

> [14] . . . The First Nation argues that in exercising his discretion to approve the grant the Director was required to have regard to First Nation's concerns and to engage in consultation. This is true. The First Nation goes too far, however, in seeking to impose on the territorial government not only the procedural protection of consultation but also a substantive right of accommodation. The First Nation protests that its concerns were not taken seriously – if they had been, it contends, the Paulsen application would have been denied. This overstates the scope of the duty to consult in this case. The First Nation does not have a veto over the approval process. No such substantive right is found in the treaty or in the general law, constitutional or otherwise.

Finding in this Case

The majority found the decision to grant Mr. Paulsen's application could potentially have an adverse impact on the LSCFN's Treaty right to fish and hunt on the 65 acres granted to Mr. Paulsen, as well as on the surrounding Crown lands to which LSCFN members have a continuing right of access. The majority also found there was at least a possibility the potential impact would be significant. This clearly triggered the duty to consult, but the court placed it at the low end of the consultation spectrum.

In this case, there was no dispute the LSCFN received appropriate notice and information regarding the application, and that the LSCFN responded by way of letter. The First Nation's concerns raised in the letter were addressed by LARC at its meeting, which the First Nation failed to attend. LARC's discussion at the meeting was detailed in minutes that were available to the LSCFN as a member of LARC. Despite the fact this process was characterized as a "courtesy" by the government, it was found to be more than adequate to discharge the government's duty in this case.

Justice Binnie reviewed the capability of regulatory processes, such as the LARC process, to fulfil the duty to consult and found such processes could be sufficient, stating:

> [39] Nevertheless, consultation was made available and did take place through the LARC process under the 1991 Agriculture Policy, and the ultimate question is whether what happened in this case (even though it was mischaracterized by the territorial government as a courtesy rather than as the fulfilment of a legal obligation) was sufficient. In *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, the Court held that participation in a forum created for other purposes may nevertheless satisfy the duty to consult if in substance an appropriate level of consultation is provided.

Minority Decision

Justices Deschamps and LeBel concurred in the result, but disagreed that consultation should extend to activities that impact modern treaty rights where the issue of consultation was dealt with generally in the treaty. It was their view that where the treaty contemplates consultation, the intention of the parties is clear and the honour of the Crown is upheld by the terms of the treaty itself. Justice Deschamps spoke strongly against the majority decision, stating:

> [107] To allow one party to renege unilaterally on its constitutional undertaking by superimposing further rights and obligations relating to matters already provided for in the treaty could result in a paternalistic legal contempt, compromise the national treaty negotiation process and frustrate the ultimate objective of reconciliation. This is the danger of what seems to me to be an unfortunate attempt to take the constitutional principle of the honour of the Crown hostage together with the principle of the duty to consult Aboriginal peoples that flows from it.

Implications

The *Little Salmon* decision operates in conjunction with *Haida* and *Mikisew* to confirm that the government is obliged to consult whenever it contemplates decisions or activities that have the potential to adversely impact any Aboriginal right, regardless of where that right originates. Whether the land is covered by a modern treaty, an ancient treaty, or no treaty at all – the duty to consult may still arise and should therefore be front of mind whenever government is considering decisions which may affect the use of land.

However, the Court also clarified two important aspects of the duty to consult:

- That regulatory processes leading to a decision can be sufficient to meet the duty to consult without separate engagement with First Nations – as long as the process covers off the elements of consultation required (easier when at the lower end of the spectrum of consultation).

- That regulatory decision-makers are required to balance the rights of the applicant before them with any impacts on rights expressed by First Nations, and the court will respect those decisions, as long as they are reasonable. In this case, the Court found "the Director was simply not content to put Mr. Paulsen's interest on the back burner while the government and the First Nation attempted to work out some transitional rough spots in their relationship. He was entitled to proceed as he did" (para. 87).

The Court has clarified that the honour of the Crown is a constitutional principle that emanates from s. 35 of the *Constitution Act, 1982* and therefore it must be applied in all circumstances as part of the general law of Canada. This judgment clarifies that everywhere in Canada – from Labrador to British Columbia and from Ontario to Nunavut – the honour of the Crown applies to dealings between the Crown and First Nations. As a result there are few places, if any, left in Canada where the duty to consult will never arise.

CANADIAN DEVELOPMENTS

Federal

NEB Approves Mackenzie Gas Pipeline Project

The National Energy Board ("NEB") approved plans on December 16 to build the Mackenzie Valley gas pipeline – a 1,196 kilometre Arctic pipeline that would, should the pipeline be built, deliver 1.2 billion cubic feet of natural gas per day from the Beaufort Sea to northwest Alberta. The NEB's approval follows an earlier, final response to the Joint Review Panel's report on the Mackenzie Gas Project ("MGP") by the governments of Canada and the Northwest Territories in mid-November, which outlines how the two governments will ensure that appropriate mitigation measures are in place to respond to environmental, social, cultural, and economic issues.

The MGP is a private sector initiative whose partners include Imperial Oil, Exxon Mobil, ConocoPhillips, Royal Dutch Shell PLC, and the Aboriginal Pipeline Group. While attaching 264 conditions to its approval, the NEB's report stated that, "Northerners want to see more people living proud and self-sufficient lives. They want better care for the land. They are looking for stronger communities that can take care of the social problems that come with limited means and rapid change." The report added that, "It takes a good economy to take care of the land and the people. We are convinced the Mackenzie Gas Project would bring the Northwest Territories closer to the vision of the North that many people have shared with us."

However, the MGP still has significant hurdles to overcome. The MGP, which is expected to cost in the region of $16.2 billion, is still subject to a decision by the federal cabinet, and the project's proponents must decide by December 31, 2013 whether they will go ahead with the building of the pipeline. The NEB has stated that actual construction on the pipeline must commence by the end of 2015.

At issue is the uncertain nature of natural gas prices. These markets are recovering from the recession; however, other natural gas sources – including shale gas and liquefied natural gas – could compete with the MGP. According to Imperial Oil spokesperson Pius Rolheiser, "The challenge of the Mackenzie Valley project is that it needs to compete on a supply/cost basis with other sources of supply in the North American market [including] . . . liquefied natural gas, shale gas, a potential Alaska [natural gas pipeline] project, and other sources of supply".

Mr. Rolheiser continued, "We would need to have sufficient confidence in a fiscal framework to enable the proponents to re-staff the team to resume . . . work".

The pipeline proponents must additionally secure land- and water-use permits, sign benefit and compensation agreements with First Nations along the pipeline route, and work out financial arrangements.

Arctic Marine Sanctuary Proposed

All petroleum industry activity in at least part of Lancaster Sound in the Eastern Arctic would be prohibited by the creation of a marine conservation area, Environment Minister John Baird has announced. "This . . . is basically the elimination of any exploration or resource extraction", he told reporters. "There are substantial natural resources, substantial oil and gas deposits, certainly oil deposits" and they would be "off-limits . . . once we negotiate and consult with the Inuit, the public, environmental groups, [and] with the government of Nunavut". However, effective immediately, all seismic exploration work in the area under consideration would be banned.

Mr. Baird said Ottawa was responding to local communities' concerns "about the impacts that resource development might have" and that the various federal departments involved in the Arctic jurisdiction had "defined the government of Canada's position on a future potential boundary". That set the stage for a steering committee which would hear all "perspectives before a final decision is made on boundaries". While the waterway at the eastern end of the Northwest Passage between Baffin and Devon Islands would be closed to exploration and development, it would remain open to shipping.

Asked about potential environmental risks posed by tankers, Baird indicated that the government would rely on regulations to reduce the prospect of spills. "What we have got to do is ensure that doesn't happen; we have got strong regulation that prohibits that from happening", he said, adding that the Canadian Forces and the Canadian Coast Guard would be involved in monitoring and enforcement. "We have got to be forever mindful of our transportation regulations in this regard to make sure that the area is kept safe. We cannot make the same mistakes in the Arctic that we have seen over the last 200 years in southern Canada."

When it was pointed out that the United States and other countries routinely challenge national jurisdiction in waterways they consider to be international bodies of water, Mr. Baird bridled. "We believe this is Canadian territory and I think we can exert our sovereignty in the north through military action. We can also exert our sovereignty through environmental action, which is one of the things we are doing today."

Mining Sector Under Scrutiny

An Opposition MP's attempt to legislate "corporate social responsibility" for Canadian mining companies' foreign operations has been narrowly defeated in the House of Commons. Bill C-300, a draft *Responsible Mining Act*, was Toronto-area Liberal MP John McKay's attempt to ensure that companies operating in the developing world with Canadian government support comply with internationally accepted environmental and human rights standards. "Canadians need to hold our government accountable for the taxpayer dollars that fund corporations with questionable environmental and human rights practices", he said after his private Bill was defeated by six votes.

Meanwhile, on the domestic front, the federal government used its jurisdictional muscle on November 2 to block the Prosperity Gold-Copper Mine Project proposed by Taseko Mines Ltd. in British Columbia, on grounds that the project would turn a pristine lake into a tailings pond. The Canadian Environmental Assessment Agency's review panel had, prior to the decision by the Government of Canada, concluded that the proposed project would result in significant adverse environmental effects on fish and fish habitat, on navigation, on the current use of lands and resources for traditional purposes by First Nations, and on cultural heritage and certain potential or established Aboriginal rights or title. Furthermore, the project was found to potentially result in significant adverse cumulative effects on grizzly bears and on fish and fish habitat. The Government of British Columbia had previously championed the $800 million project despite local First Nations opposition. B.C. Mines Minister Randy Hawes has indicated that the Province would help the company to revise its proposal in the hope of securing Environment Canada's endorsement.

Carbon Capture Technologies Immature

A study commissioned by Environment Canada concludes that carbon capture and storage ("CCS") technology requires significant funding, probably only sustainable through additional taxes, if it is to be used successfully in curbing greenhouse gases ("GHGs"). "Government taxes and policies will . . . be required to set about implementing large-scale, long-term, wide-spread CCS technology", it states. "In the absence of these government penalties, only low-cost capture and value-added storage . . . will provide an opportunity for CCS." Prepared by AECOM Canada Limited, a Calgary-based consultancy with clients worldwide,

the study recommends more research and development if CCS technologies are to become more effective and affordable.

A departmental spokesman said that Environment Canada, despite having funded the study, does not necessarily endorse its conclusions. "This consultant report reflects the views and opinions of the contractor and not necessarily those of the government", he said, adding that the department would use the report "to further understand and inform future work in the area of carbon capture and storage". Ottawa and the provinces have spent close to $3 billion in recent years on CCS research and pilot projects, including a joint venture with the United States in southern Saskatchewan.

Heavy-Duty Vehicles Exhaust Rules Proposed

A consultation document on elements of proposed regulations to reduce greenhouse gas ("GHG") emissions from heavy-duty vehicles has been published by the federal government. "Canada and the United States have had great success in working together to reduce emissions from new light-duty vehicles, and we are looking forward to doing the same for heavy-duty vehicles", the government said in making the document available for public discussion. In Canada, the transportation sector accounts for about 25 per cent of GHG emissions and, in turn, heavy-duty vehicles account for about a quarter of that. The government is counting on reduced transportation emissions playing a key role in meeting the overall goal of a 17 per cent reduction in Canada's GHG emission from 2005 levels by 2020.

Air and Water Quality Addressed

Environment Minister Jim Prentice and his provincial and territorial counterparts have agreed to new standards for air quality in general and for industrial emissions in particular. Officials have been directed to develop the major elements of the proposed system with a view to putting it into effect in 2013. "Air pollution has a huge impact on the environment, human health and the economy", Charlene Johnson, Minister of Environment and Conservation for Newfoundland and Labrador, said in her capacity as this year's President of the Canadian Council of Ministers of the Environment ("CCME"). "This initiative builds upon existing federal, provincial and territorial actions to manage air quality. Setting clear standards will ensure closer links between strong economic development and a sustainable, healthy environment."

In their official communiqué after their recent meeting in St. John's, the Minister cited a 2008 Canadian Medical Association study which concluded that the annual cost of illnesses attributable to air pollution topped $8 billion. Adding that pollution also damages ecosystems and damages infrastructure, the ministers said that their new initiative would include "more ambitious … air quality standards and consistent industrial emissions standards across the country". However, it would be subject to local jurisdictional priorities with provinces and territories coordinating airshed programs within their jurisdictions.

The CCME also endorsed a three-year Water Action Plan which sets out deliverables and outcomes in line with targets identified previously. "These goals will help ensure that Canadians have access to clean, safe and sufficient water to meet their needs in ways that also maintain the integrity of ecosystems", the ministers said. The plan includes development of a national groundwater management framework, drafting of guidance documents on sharing of ground and surface water data, and assessments of watersheds for their vulnerability to climate change.

Canada–B.C. Agreement on GHG Data Collection

Environment Minister John Baird and British Columbia's Minister of State for Climate Action John Yap announced on December 17 that Canada and British Columbia will coordinate their greenhouse gas ("GHG") emissions reporting under a national single window system in an effort to minimize duplication and reduce the reporting burden for industry and governments.

According to Minister Yap, "Being able to report GHG emissions only once while meeting the requirements of both the federal and provincial governments will save British Columbia industries time and money. This is another example of the strong partnership we have with the Government of Canada, and single window reporting will be an important tool as British Columbia moves towards a regional cap-and-trade system."

Alberta

New Carbon Capture and Storage Legislation Introduced

The Province of Alberta introduced Bill 24, *The Carbon Capture and Storage Statutes Amendment Act, 2010*, on November 1, 2010. The proposed Bill aims to provide guidance on and regulate large-scale carbon capture and

storage ("CCS") projects, and to clarify the ownership of pore space where carbon dioxide will be stored.

Under the proposed Act, the Crown would own the subsurface pore spaces and would accept permanent liability for injected carbon dioxide once the CCS operator has collected data substantiating that the stored carbon dioxide has been contained. In turn, the CCS operator would be responsible for mitigation work during operation and would remain responsible until a closure certificate has been issued by the Crown. Bill 24 also proposes the establishment of a post-closure stewardship fund, financed by CCS operators for ongoing monitoring costs and required remediation.

Ontario

Water Opportunities and Water Conservation Act Passed

The Ontario Legislature passed the *Water Opportunities and Water Conservation Act* on November 23, 2010, with the aim of encouraging the protection of clean water sources and to support the development of water-related industries.

Under the Act, a Water Technology Acceleration Project would be created, bringing together industry, academics, and government to develop water technologies and services and to promote the sector abroad. The Act also seeks to encourage Ontarians to consume water more efficiently through water efficiency standards for consumer products, setting water use goals, and requiring standardized information on water use on bills. The Act further seeks to strengthen sustainable municipal water planning by assisting municipalities in the identification of and planning for long-term infrastructure needs.

Saskatchewan

Unique Consultation Agreement Signed with Several First Nations

A one-of-a-kind agreement was signed on December 10 by Environment Minister Dustin Duncan and the Chiefs of the James Smith Cree Nation, the Peter Chapman Band, and the Chakastaypasin Band of the Cree, outlining how the parties will work together on understanding the impacts of a proposed diamond mine on the communities and their treaty and Aboriginal rights.

The consultation agreement, which relates to the environmental assessment of Shore Gold's Star-Orion South Diamond project, outlines general provisions for consultation on the project, the roles and responsibilities for each party in the consultation, and the environmental assessment processes. The agreement does not bind the signatories to support the mine and is not a financial agreement. It also supports the province's legally required consultation process and environmental assessment timelines.

"The signing today is another step on our journey to being a healthy, wealthy and prosperous community", said James Smith Cree Nation Chief Wally Burns. "The agreement is the first of its kind in Saskatchewan and it will require diligence on the part of all parties to ensure we secure the future our ancestors foresaw in the Treaties." Peter Chapman Band Chief Robert Head added, "We view this agreement as a significant milestone. While other First Nations wrestle with the issue of consultation and accommodation we have successfully negotiated the means and process to protect our interests and build a brighter future for our children. The environment and development must be carefully managed. This agreement ensures we are at the table to do so." Chakastaypasin Band of the Cree Chief Calvin Sanderson agreed, saying, "The signing of the consultation agreement is proof that negotiation and not confrontation works, and that shared vision and hard work of the provincial and First Nation governments can create the environment for mutual prosperity".

NORTH AMERICAN AND WORLD DEVELOPMENTS

U.S. Supreme Court Grants *Certiorari* in American Electric Power Case

On December 6, 2010, the U.S. Supreme Court granted *certiorari* in *State of Connecticut v. American Electric Power*, enabling the Court to hear an appeal in Spring 2011 which may, depending on the outcome, open the floodgates for greenhouse gas ("GHG") litigation against utilities, coal and petrochemical companies, automobile manufactures, and other sectors. This case will also set a precedent for the standing of states and private parties that seek to regulate GHG emissions through common law tort actions.

In this case, a group of eight states, as well as New York City and three environmental land trusts, filed a suit against six utility companies for common law nuisance in respect of their carbon dioxide emissions, and sought injunctive relief to compel the utilities to reduce their emissions. The

trial court dismissed the case on the basis that the "political question doctrine" applied such that only the legislative and executive arms of government could appropriately balance the array of environmental, economic, and other issues presented. However, on appeal, the Second Circuit reversed the trial court's decision, holding that the political question doctrine does not preclude federal common law nuisance claims. The Second Circuit held, in particular, that federal courts have the authority to limit the annual 650 million tonnes of GHG emissions from industry unless and until the U.S. Environmental Protection Agency ("EPA") begins regulating emissions from existing power plants.

The six utilities named in the case argue that the states lack standing to bring public nuisance lawsuits targeting power plants, and that the alleged damages are not redressable by targeting individual sources of GHGs. The utilities further assert that common law tort actions are pre-empted by the EPA's regulations under the *Clean Air Act*.

UK Plans to Lead a Clean Energy Revolution

The UK government has today [December 16, 2010] published proposals on a series of "once in a generation" energy market reforms to safeguard and diversify the nation's energy supply for the future and trigger a wave of new investment to:

- Replace UK's existing aging coal and nuclear power plants
- Build more renewable projects such as wind and solar
- Increase CCS plans to allow UK to continue to use coal and gas
- Allow UK to meet its 2050 emissions targets

UK Energy Secretary Chris Huhne announced four new reforms that would create "a level playing field for low carbon technologies in the UK's electricity market":

- A Carbon Floor Price will increase investment in low carbon generation by providing a clearer long term price for carbon in the power sector.
- Through a proposed 'contract for difference' Feed In Tariff, the Government will agree [to] clear, long term contracts, resulting in a top up payment to low carbon generators if wholesale prices are low but clawing back money for consumers if prices become higher than the cost of low carbon generation.
- A Capacity Mechanism will ensure there remains an adequate safety cushion of capacity as the amount of intermittent and inflexible low carbon generation increases.
- An Emissions Performance Standard will reinforce the existing requirement that no new coal is built without carbon capture and storage.

The Department for Energy and Climate Change says the four proposed reforms build on the recommendations of the Committee on Climate Change, they make good on specific commitments in the coalition's programme for government, including that there will be no subsidy for new nuclear, and they live up to the Prime Minister's promise that this would be the greenest government ever.

Rules for existing energy investment such as the Renewables Obligation ("RO") would be protected but Mr Huhne said: "Without investment in renewables, new nuclear and carbon capture and storage, emissions will remain too high, we will become dependent on energy imports, and increasingly vulnerable to fossil fuel price volatility. Low carbon technologies must be given the chance to become the dominant component in our electricity mix. In the new, reformed UK electricity market, the economics of low carbon will stack up like nowhere else in the world. By 2030, three quarters of our electricity could be low carbon."

He said the UK had a "Herculean task" ahead to replace a quarter of all UK's ageing coal and nuclear electricity generation plants and to cope with an anticipated doubling of electricity demand to 2050 as consumers increasingly use electricity for vehicles and heating their homes. According to Ernst & Young LLP, the cost of replacing existing plants and building renewable projects will be around 200 billion pounds ($316 billion). The UK government estimates that £110 billion alone will be needed in the next 10 years with each new nuclear power plant costing up to £6 billion.

Earlier this year, UK Energy regulator Ofgem said that "far-reaching energy market reforms" were necessary and said that while privatization had kept down energy prices, the scale of investment needed to meet climate change targets and replace aging plants is so large it wouldn't happen without government guarantees. Achieving the necessary certainty required by major investors has to date been clouded by external factors including the global financial crisis, significant world-wide demand for investment in energy, tough EU emissions targets, the closure of ageing power stations, an increasing dependency on gas imports, and uncertain carbon prices.

Mr Huhne said today that the planned reforms would create "greater certainty of delivering the investment so the lights stay on in this new low carbon world".

Mark Kenber, Deputy CEO The Climate Group said: "The UK has no time to spare in overhauling its creaking high carbon energy supply if it wants to keep the lights on and meet its bold targets for cutting national emissions. This reform is both urgent and necessary to break the UK's addiction to high carbon energy because until now market forces and a fluctuating carbon price have created an uncertain environment for investors and policymakers alike. A clear market signal is required in 2011 to trigger the low carbon investment, jobs and growth that will cement the UK as a leading player in the £3 trillion global market for low carbon goods and services. The reforms must support large-scale expansion of renewable capacity, address infrastructure needed to bring offshore wind and other clean energy onto the national grid and there should be a focus on efficiency to reduce the numbers of new plants required. Getting this right for the environment, and to keep costs as low as possible for businesses and consumers, means starting now."

A spokesperson for Scottish Power said: "Today's publication is an important milestone on the road to securing an investment framework for the decarbonization of Britain. Now we need to fill in the detail, on which the success of this plan will depend. At ScottishPower we will work with the Government to ensure that the final package delivers the progress that we need, while keeping the interests of consumers firmly in mind."

As well as creating cleaner and more secure supply, Chris Huhne claimed the reforms would also be better for UK consumers: "There is no doubt that this framework . . . will actually save money for consumers compared with patchwork quilt of measures we have at the moment". He has estimated that under the new plans consumer bills could be 4 per cent lower than alternative policy measure the current government have inherited.

- Responses to the proposals on a carbon floor price should be made to the Treasury by 11 February, with final decisions expected in the Budget on 23 March 2011. The full consultation document is available at www.hm-treasury.gov.uk

- Responses on the other three components of electricity market reform are invited by 10 March 2011, with final proposals expected in a White Paper in late Spring. The full consultation document is available at www.decc.gov.uk

- A parallel review of Ofgem and the energy regulatory framework is under way to clarify the respective roles of the Government and Ofgem. Responses to the Government's initial consultation are published today at www.decc.gov.uk/en/content/cms/consultations/ofgem_review/ofgem_review.aspx

Source: The Climate Group, December 16, 2010. This article is reproduced with permission. Please see The Climate Group's Web site at ***www.theclimategroup.org****.*

BUSINESS AND THE ENVIRONMENT

Banks Grow Wary of Environmental Risks

Coal companies, as well as other industries with substantial environmental impacts, are beginning to find a formidable adversary to contend with – banks and other lenders financing the bonds and loans for their projects. Recent environmental disasters, like the April 2010 Deepwater Horizon explosion in the Gulf of Mexico, promise years of legal entanglements for companies and their insurers. It's no wonder a number of large commercial lenders are beginning to rethink their positions on industry practices that appear risky to their reputations and bottom lines.

Wells Fargo, one of the lenders to mountaintop removal ("MTR") mining practitioners said that its involvement with companies performing MTR mining was "limited and declining". Wells Fargo is not alone; major players, including Credit Suisse, Morgan Stanley, JPMorgan Chase, and others, have increased their scrutiny of mining companies involved in MTR – or stopped credit entirely. Stephanie Rico, a spokesperson for the environmental affairs group at Wells Fargo, said, "We're taking a much closer look at a much broader variety of issues, not all of which are captured under state and local laws".

Where banks extend credit has become a hot button issue. In 2007, Trillium Asset Management filed a shareowner resolution with Bank of America requesting that the bank "amend its [greenhouse gas] policies to observe a moratorium on all financing, investment, and further involvement in activities that support MTR coal mining". More recently, Boston Common Asset Management filed a resolution with JPMorgan Chase requesting that the company report on the environmental and financial impacts of the MTR projects it finances. Thanks to its progress with the bank, the resolution was withdrawn.

According to Rebecca Tarbotton, executive director of the Rainforest Action Network, an environmental activist group (**www.rainforestactionnetwork.org**), "When the top four banks in the country back away from Massey Energy and other leading mountaintop mining operators, it sends a clear signal that these companies have a high risk profile and that other banks should beware. Bottom-line, as access to capital becomes more constrained it will be harder for mining companies to finance the blowing up of America's mountains".

Roger Hendriksen, vice president for investor relations for Massey Energy, disagreed, "While some banks no longer provide financing for companies conducting surface mining, there are many who will". He continued, "We have and will continue to replace their services with alternate bank providers with little difficulty". In fact, while the top four banks may be unwilling to lend to mining companies engaged in MTR, one bank, PNC, continues to finance mining companies responsible for almost one-half of all MTR coal mined in the United States.

Karina Litvack, the head of governance and sustainable investment with F&C Investments, an investment management firm based in London (United Kingdom), had another cautionary note. "It's one thing if your potential borrower is dumping cyanide in a river", she said. "But if they're dumping carbon dioxide into the air, which is not exactly illegal – what do you do? Banks are in kind of a quandary, because they are competing for business, and if they get holier-than-thou and start to play policeman, they risk allowing other banks to take that business."

From a broader view, banks and environmental groups are joining forces to make things easier for everyone by developing best environmental practice measures and other voluntary initiatives. For example, a number of large banks helped with the formation of the Carbon Principles, aimed at standardizing the assessment of carbon risks in the financing of electric power projects in the United States. Several international financial groups – such as HSBC, Munich Re, and others – have initiated the Climate Principles to encourage the management of climate change, "for every organization that adopts the Climate Principles is actively managing climate change across the full range of financial products and services".

For more information, see:

www.nytimes.com/2010/08/31/business/energy-environment/31coal.html?_r=1&emc=eta1;

www.theclimategroup.org/programs/the-climate-principles/; and

www.socialfunds.com/news/article.cgi?sfArticleId=3027.

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Ship Efficiency Measures Could Become Mandatory

A point of discussion at the most recent meeting of the International Maritime Organization's ("IMO") Marine Environment Protection Committee ("MEPC") was the possibility that the Energy Efficient Design Index ("EEDI") and Ship Energy Efficiency Management Plan ("SEEMP") could be made mandatory for certain vessels. The 61st meeting of MEPC took place in London from September 27, 2010 through October 1, 2010.

The IMO is the United Nations ("UN") agency that has responsibility for the safety and security of shipping and the prevention of marine pollution by ships. The MEPC is empowered to consider any matter within the IMO's scope that concerns the prevention and control of pollution from ships. It oversees, among other things, the adoption of amendments to the major international treaty governing marine pollution from ships, the International Convention for the Prevention of Pollution from Ships ("MARPOLM").

While not supported by all member states, a proposal was discussed to make the use of the currently voluntary EEDI and SEEMP mandatory for new vessels. The EEDI is a non-prescriptive, performance-based mechanism that allows the industry to decide which technologies to use in a specific ship design. As long as the required energy efficiency level is attained, ship designers and builders would be free to use the most cost-efficient solutions for the ship to comply with the regulations. The SEEMP establishes a mechanism for a shipping company and/or a ship to use to improve the energy efficiency of ship operations.

MEPC members also discussed a number of other possible measures to reduce greenhouse gas ("GHG") emissions from ships. A feasibility study and impact assessment of various market-based mechanisms to reduce GHGs was presented. Market-based mechanisms could range from a levy on carbon dioxide ("CO_2") emissions from all ships or only from ships not meeting the EEDI requirements, to emissions trading systems, to schemes based on a ship's actual efficiency, both by design (EEDI) and operation (SEEMP). The Working Group on GHG Emissions from Ships will meet to evaluate the options in March 2011, and the recommendations will be taken up by the MEPC at its next meeting in July 2011.

According to the International Chamber of Shipping ("ICS"), several nations, including China, India, and Saudi

Arabia, oppose mandatory measures being applied uniformly to shipping. [. . .] The ICS takes a different view; the organization explained that only about 35% of the world fleet is registered with Kyoto Protocol Annex I nations, and that most shipping companies have the freedom to decide to register their ships with the nations of their choice, including non-Annex I countries. Given that situation, the ICS asserts that applying mandatory measures only to Annex I countries makes "no sense at all" in a global industry like shipping.

For more information, see **www.imo.org/MediaCentre/PressBriefings/Archives/Pages/2010.aspx** and **www.marisec.org/pressreleases.html#5.11.10**.

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ENFORCEMENT

Federal

North 60° Petro Limited Convicted for Discharging Hydrocarbons Into the Yukon River

North 60° Petro Limited pleaded guilty on November 12 in the Whitehorse Territorial Court for failure to comply with an Environment Canada Inspector's Direction requesting that the company stop discharging hydrocarbons into the Yukon River from the North 60° Petro Bulk Terminal site in Whitehorse, Yukon. Failure to comply with an Inspector's Direction is a violation of the *Fisheries Act*, which prohibits the discharge of deleterious substances into fish-bearing waters.

Environment Canada issued the Inspector's Direction to the company requesting an immediate stop of the discharge in December 2006. North 60° failed to comply with the Inspector's Direction, which expired in November 2007, and the company was granted a 30-day extension in December 2007 to comply with the original Inspector's Direction. North 60° Petro Limited was charged in April 2009 for failing to comply with an Inspector's Direction and thereby committing an offence under the *Fisheries Act*.

The company was ordered to pay a $2,000 fine and make a $28,000 contribution to the Environmental Damages Fund. The Territorial Court has also ordered that the company cease discharging hydrocarbons into the Yukon River, and to remove the deleterious substances that were previously discharged into the Yukon River.

Alberta

Agrimax Ltd. Operations Suspended for Environmental Violations

As a result of ongoing contraventions under Alberta's *Environmental Protection and Enhancement Act*, the Province of Alberta has indefinitely suspended Agrimax Ltd.'s approval to operate. The company had operated a sulphur processing plant in the Municipal District of Rocky View. The plant may not resume operations until Agrimax has complied with all of the terms of the order.

Alberta Environment had issued enforcement orders to the company in January 2005 to compel compliance with its approval and *Water Act* licence. Non-compliances included unauthorized releases of industrial waste water and improper waste storage.

Under the enforcement order suspending Agrimax's operations, the company must also:

- develop and implement upgrades to the sulphur handling facilities at the plant;
- develop and implement a groundwater remediation program and a program for the management of contaminated soil at the plant site;
- upgrade the existing industrial run-off pond and implement an inspection and maintenance program for the plant; and
- complete a third-party assessment of the facility to ensure that any future operation of the plant does not pose a risk to public health or the environment.

Calgary Gas Station Site Issued Environmental Protection Order

The Government of Alberta has issued an environmental protection order against Gas Plus Inc. for failing to remediate contamination on and off their property in Calgary.

Alberta Environment has been working with Gas Plus Inc. since May 2010 to address a fuel leak discovered on site. In August, Alberta Environment was notified that gasoline vapours were detected in a residential basement adja-

cent to the Gas Plus Inc. site. The company subsequently reported to Alberta Environment that approximately 7,000 to 9,000 litres of gasoline had been released from Gas Plus Inc. over a period of several months.

In September, Alberta Environment instructed Gas Plus Inc. to take immediate actions to reduce vapours within the affected residence. The company was also required to submit plans to delineate the contamination and remediate the site. To date, Alberta Environment has not received a proper remedial plan nor has Gas Plus Inc. taken adequate or timely steps to address the vapours or identify, delineate, or remediate the release.

Under the order, the owners of the gas station are required to immediately mitigate any identified impacts to adjacent residences, and submit to Alberta Environment plans to delineate and remediate the contamination. Remedial actions are required to be implemented no later than March 4, 2011.

Ontario

Dynamotive Canada Inc. Fined $104,000 for Particulate Discharge

On November 17, 2010, Dynamotive Canada Inc. was fined a total of $104,000 for discharging or causing or permitting the discharge of particulate matter into the environment that caused an adverse effect, and for having failed to notify the Ministry of the Environment ("MOE") of the discharge.

On July 25, 2008, residents living across from the company's plant in West Lorne reported seeing clouds of sawdust being emitted from a baghouse exhaust, which covered adjacent properties and forced some residents to stay indoors. The MOE only became aware of the discharge when a resident phoned in a complaint on July 28, 2008. The company was charged following an investigation by the MOE's Investigations and Enforcement Branch.

Dynamotive Canada Inc. was fined $52,000 for the particulate discharge and an additional $52,000 for failing to notify the ministry for a total of $104,000 plus victim fine surcharges, and was given one year to pay the fine.

ONTARIO BAR ASSOCIATION CLE PROGRAMMING

Air, Soil and Waste Issues – A Year of Many Changes Put into Context

Toronto: Thursday, February 3, 2011 (2:00 p.m.–5:00 p.m.)

Program Chair: Janet Bobechko, Blaney McMurtry LLP

In the past 18 months, Canadian regulators have unveiled more environmental regulation than in the previous 18 years. Ontario is facing a plethora of new federal, provincial, and municipal environmental law initiatives, including those addressing greenhouse gases, toxic substances, air emissions, renewable energy, contaminated land, species at risk, and approvals and enforcement reform. This half-day program will alert you to the most significant recent changes in environmental law. Speakers will share their practical insights regarding these changes. This program is essential for public and private sector lawyers including those that practice environmental law occasionally or full-time.

Please see the link for more information: **www.softconference.com/oba/eventdetails.aspx?userID=78521221601099844122020108423 2&code=11ENV0203C**.