

**UPDATE ON LEGAL AND
REGULATORY ASPECTS OF
COAL BED METHANE DEVELOPMENT
IN BRITISH COLUMBIA**

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INSIGHT INFORMATION

Prepared by:

Brian E. Abraham
Fraser Milner Casgrain LLP
15th Floor, 1040 West Georgia Street
Vancouver, BC V6E 4H8

Telephone: 604-443-7134
Facsimile: 604-683-5214
brian.abraham@fmc-law.com

Lawyers in:

Montréal

Ottawa

Toronto

Edmonton

Calgary

Vancouver

New York



FRASER MILNER CASGRAIN LLP

www.fmc-law.com

Table of Contents

1.0	HISTORICAL OVERVIEW	1
1.1	Crown Grants.....	1
1.2	Railway Lands	2
1.3	E&N Railway Lands	2
1.4	Kootenay Lands.....	4
1.5	Coal Mining Legislation.....	4
1.6	Surrender Documents of 1973 and After	5
1.7	Crow’s Nest Case	5
1.8	Mineral Title Registry Project.....	6
1.9	Cautions on Determining Ownership of CBM Interests on Private Lands.....	6
2.0	COALBED GAS ACT	8
3.0	COALBED METHANE ACQUISITIONS AND POLICIES	9
3.1	Acquisition of Coalbed Gas Tenures	9
3.2	Access	9
3.3	Spacing for Coalbed Methane Wells	10
3.4	Coalbed Methane Guidelines	10
4.0	<i>OIL & GAS ACTIVITIES ACT</i>	12
5.0	LOCAL GOVERNMENT REGULATION OF COALBED METHANE DEVELOPMENT.....	13
6.0	RESOURCE ROAD ACT	13
7.0	FIRST NATIONS CONSULTATION	14
7.1	Taku River Tlingit First Nation v. Ringstad et al.	14
7.2	Council of the Haida Nation v. British Columbia and Weyerhaeuser	15
8.0	COALBED GAS ACT	16

1.0 HISTORICAL OVERVIEW

In August of 1858, the Colony of British Columbia was formed from the union of the Mainland colony and Vancouver Island colony, both of which were at the time Crown colonies of Great Britain. The impetus for this union was the discovery of gold near Barkerville, British Columbia and the concern of Great Britain with the influx of miners primarily from the California goldfields over its sovereignty of the area and some concerns about Russian expansion in Alaska. As Crown colonies, they were the owners of the lands and all mines and minerals located within their boundaries. This is significant because of disputes that subsequently arose between the federal and provincial governments over the ownership of minerals in what became known as the Railway Belt or Railway Grant Lands.

In 1871, the Crown colony of British Columbia joined the Dominion of Canada primarily on the strength of a promise by Canada to build a railroad to the west coast within ten years. In 1885, the railroad was completed.

One of the conditions of confederation was that the Colony of British Columbia would give to the federal government certain lands which became known as the Railway Lands and the federal government would in turn make available to the railroad the lands together with all appurtenances and ancillary rights to the lands in exchange for the railway company building the railroad.

1.1 Crown Grants

In British Columbia, originally Crown grants encompassed ownership from the center of the earth to the top of the sky in theory so that when a grant was made from the Crown it granted everything not just the surface but also all mineral rights, all undersurface rights, all water rights and all timber rights. The only exclusion to this, and this does not necessarily apply in every instance, was the general exclusion for precious metals (gold and silver).

Over time the provincial Crown began to grant lands (primarily under the Land Acts in existence from time to time) and they began to reserve to the Crown such rights as coal, followed by petroleum and followed shortly thereafter by natural gas. In many instances Crown grants were also made which excluded timber and water rights. The result of these reservations from the bundle of rights granted under Crown grants, resulted in a system that today a Crown grant is really a grant of the surface only and not any undersurface, timber, water or other rights.

This reservation of various rights led to mineral Crown grant system being established. British Columbia was anxious to encourage mineral development and it created the undersurface mineral

Crown grant. It was designed to grant minerals to parties prepared to carry out mineral exploration and development on certain conditions being met after staking the ground initially. In some instances the mineral Crown grants were not made for all of the minerals but only some of the minerals. Mineral Crown grants were last issued in British Columbia about 50 years ago. Today, minerals are acquired under the *Mineral Tenure Act*, the *Coal Act* or the *Petroleum and Natural Gas Act* or by transfers of pre-existing mineral Crown grants.

Note that while undersurface Crown grants or mineral Crown grants as they came to be known, were surveyed and noted up in land title office records, they did not necessarily coincide with surface Crown grants and there are many instances where the surface Crown grant has certain mineral rights and the undersurface Crown grant has other mineral rights. This arises because the areas covered by each of the grants are not always coincident and the determination for the ownership of minerals can be complex.

1.2 Railway Lands

The Canadian Pacific Railway (“CPR”) was granted lands in Southern British Columbia to build the mainland portion of the railroad. The CPR subsequently made numerous transfers of interests in the Railway Lands to various parties. Many of the transfers that were made by the CPR specifically excluded such things as coal and fireclay. At the time of the grant to the railways, lands which had been previously alienated by the provincial Crown were specifically exempted from the provisions of the transfer; however, these lands were not identified other than to say that the grant excluded them.

1.3 E&N Railway Lands

The Esquimalt and Nanaimo Railway or E&N Railway was granted lands located on the east coast of Vancouver Island running from Victoria in the south to Campbell River in the north on the same basis that the Canadian Pacific Railway was granted lands in Southern British Columbia for the Mainland portion of the railroad.

The E&N Railway was granted these lands in a series of grants in exchange for building a railroad. The grant included all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder. These grants can be considered an absolute fee simple grant with the exception of gold and silver, which while not specifically referenced in the grant, are considered precious metals. Unless the Crown specifically grants title to the precious metals, they are deemed to be reserved. There are a number of cases on this point that arose as a result of the railway belt land grants in British Columbia and the Privy Council (at that time the highest court in

Canada), determined that the provincial Crown did not transfer the precious metals at the time that the railway grants having been made.

The actual grant came from an act of the Parliament of Canada entitled “An Act Respecting the Vancouver Island Railway, the Esquimalt Graving Dock and Certain Railway Lands of the Province of British Columbia granted to the Dominion”. The grant was made on April 21, 1887 and the document was recorded on May 25, 1887 in the Land Title Office Records in British Columbia.

British Columbia subsequently transferred the Railway Lands to the federal government who in turn transferred them to the railroad complete with all mines and minerals. The only exception to the minerals were the precious metals (silver and gold) which were retained by the provincial Crown and not transferred to the federal government.

The E&N Railway became part of the Canadian Pacific Railway organization and subsequently made numerous transfers of interests in the Railway Lands to various parties. At the time of the grant to the railways, lands which had been previously alienated by the Crown were specifically exempted from the provisions of the transfer, however these lands were not identified other than to say that the grant excluded them.

The railway grant itself was registered in the Land Title Office using maps rather than registration against specific parcels for the most part. This resulted in scenarios that created uncertainty which exists up to the present day with regard to the ownership of subsurface rights and specifically subsurface rights dealing primarily with mines and minerals.

Many of the transfers that were made by the E&N Railway specifically excluded such things as coal, iron and fireclay. The exclusion of coal was primarily due to the fact that the area on the east coast of Vancouver Island from Nanaimo in the south to roughly Comox-Cumberland in the north was an area of known coal resources and active collieries whose primary purpose was at the time a strategic one for providing coal for the steam boilers of the Royal Navy ships. There was also a domestic market which developed not only for ships but for domestic heating purposes and some exports to the United States.

The mineral portion of these lands remained essentially intact until 1973 when the provincial government brought in legislation known as the *Mineral Land Tax Act* which had the effect of taxing lands in which mineral rights were held. As a result of this legislation, most mineral rights were surrendered back to the provincial Crown by a series of surrender documents. These documents identify lands in which E&N Railway and its related companies including Pan Canadian Petroleum (as

it then was), surrendered all of their mineral rights. It is important to note that this surrender document specifically excluded any rights which had been granted to third parties by the E&N Railway and its related companies. It, however, did not identify in the surrender documents which lands would have been affected by previous alienations. This document was also registered in the Land Title Office as a global number and is not generally noted against specific parcels of land.

1.4 Kootenay Lands

The province also granted lands to railway companies for the construction of railroads. For the most part, these grants were made under the *Railway Aid Act of 1890* and subsequent amendments (the “Act”). The Act granted, to a number of different railway companies, lands located primarily in the Southeast portion of British Columbia if the railway companies completed construction of railway lines. In most cases the lines were not built, and the land grants were never made. According to the Act, these lands were to be originally granted in fee simple to the railway companies; however, the actual Crown grants made to the railway companies in fact were significantly less than fee simple interest, and in many instances the provincial Crown retained mineral rights and other rights such as the right to building materials for public purposes, the right to acquire one-twentieth of the lands for public purposes and in the event towns were constructed, one-quarter of all the lots located in the town. As well, the land grants specifically excluded any lands which had already been alienated by the provincial Crown prior to the land grant having been made.

On April 26, 1890, the provincial government enacted legislation (Chapter 40) entitled “An Act in Aid of Certain Railways”. The work on the railway was to commence within three years and be completed within five years.

Under Section 1 of the Act, Crow’s Nest Pass Coal Company was to receive 20,000 acres of public land for each one mile of railway completed throughout its entire length, provided that the railway was not less than 4’8½” in gauge. The land was to be taken in alternate blocks on each line of the railway based on a frontage line of the railway of 20 miles. The legislation also provided for survey requirements and, under Section 10, excluded any lands previously alienated by the Crown including Indian reserves, military naval reserves, lakes or other lands in which a person other than the Crown had a vested interest.

1.5 Coal Mining Legislation

In 1888, an “Act to Encourage Coal Mining” was passed and it was referenced as the *Coal Mines Act*. Under Section 2, persons could “procure a licence for the purpose of prospecting for coal or

petroleum upon lands under lease from the Crown, in which the mines and minerals, and power to work, carry away, and dispose of the same, is excepted or reserved, shall, before entering into possession of the particular part of the said coal lands...". Under Section 4, a licence is 640 acres or 80 chains square (a chain is 66 feet).

1.6 Surrender Documents of 1973 and After

In 1973, the provincial government enacted the *Mineral Land Tax Act* which imposed a tax on subsurface mineral rights in the province. As a result of this legislation, many owners of such rights elected not to pay the tax and either forfeited their interest in the subsurface rights or surrendered these rights. The nature of these surrender documents varies from quit claims where the party surrendering simply states that it is surrendering whatever it has and makes no representation or warranty as to the nature of the interest being surrendered through to documents where the surrendering party states that it is surrendering minerals which were granted to it as a result of the railway land grants. In some instances the surrendering party is surrendering more than it owned at the time of the surrender because of transfers made by the surrendering party's predecessors which transferred certain undersurface rights to third parties who now hold such interests.

At present, the *Mineral Land Tax Act* taxes all mineral undersurface rights, however, this may be a statute which has a broader interpretation by government than one that would be given to it by the Courts given the requirement that taxing statutes must generally be clear and unequivocal.

It should also be noted that the statute in creating a tax regime does not identify all lands which may be subject to this tax and it is not uncommon for the Mineral Land Tax branch to identify lands every year which have not been previously identified as mineral lands subject to the act.

1.7 Crow's Nest Case

Crow's Nest Pass Coal Company (Limited) v. The Queen et al.
(Supreme Court of Canada [1961] S.C.R. 750)

Crow's Nest sought a declaration that it was the owner of petroleum and natural gas underlying certain lands granted by the Crown to a predecessor (British Columbia Southern Railway) in title. The Court dismissed the petition holding that "minerals" include petroleum and natural gas at the time of the grant from the Crown in 1899.

The Court found that the intention of the Crown that the minerals were reserved to the Crown (except for coal which was specifically granted).

The *Railway Aid Act of 1890*, by which B.C. Southern Railway acquired the lands allowed for a grant of fee simple interests, however, the actual grant excluded the minerals (save for coal). The land grant was contingent on completion of the rail line. The *Mineral Act of 1896* defined mineral but the definition did not include petroleum and natural gas. The Court looked to the vernacular tests to define minerals. The *Coal Mines Amendment Act of 1892* referenced petroleum and by implication the Crown reservation included petroleum.

1.8 Mineral Title Registry Project

The Crown is concerned that land title searches of Crown grants have not been very conclusive as to mineral tenure ownership and they are proposing legislative changes to avoid lengthy court cases involving the interpretation as to ownership. The problems as to surface, subsurface charges, transfers of properties, undersurface charges not being shown, lack of ability to determine the original ownership, historical searches having to be carried out, the interpretation required, and whether or not the minerals would be owned by the Crown or other undersurface rights holders was proving difficult in ascertaining ownership of minerals in parts of the province. They plan to initially carry out a program on Vancouver Island to determine mineral ownership of these lands and then adopt that concept around the province. The process presently is expensive because of the need to retain lawyers and title researchers and the Crown needs to do this in order to grant mineral tenures and that this is an attempt to clarify the title situation. The program commenced in the fall of 2002 and it was intended to avoid historical reviews of ownership.

The plan is to register mineral ownership by mineral type and confirm this through legislation.

The idea is to eliminate uncertainty and to avoid having to re-interpret documents.

The Crown intends to create a mineral title registry which will show current registration of freehold mineral titles in the province by mineral type. The present status of this initiative is not known.

1.9 Cautions on Determining Ownership of CBM Interests on Private Lands

Some Crown grants have petroleum and natural gas rights attached to them as these grants predate Crown reservations for these minerals and these Crown grants are generally located at various parts of the Province particularly those areas where the early settlements occurred. For example, the Kootenays, Kamloops, Fraser Valley and Vancouver Island.

On Vancouver Island, the E&N Railway Land Grants specifically excluded pre-existing grants however they did not identify those grants clearly and in some instances these grants continue to hold the petroleum and natural gas rights.

Numerous transfers have been made over time and subsequent transfers are made of these interests and while the Land Title Office registered these transfers they may have not accurately picked up all of the undersurface rights, particularly mineral rights and as a result it is necessary to do a root title searches in those areas where there may be some question as to the ownership of petroleum and natural gas rights. The imposition of the *Mineral Land Tax Act* in 1973 identified many of these parcels and in most cases the parties surrendered their rights however because this is an ongoing process one should not assume all of those records would be surrendered by the parties holding Crown grants at the time of the imposition of the *Mineral Land Tax Act*.

It is noted that surrenders are being done right up to the present day because of the imposition of the *Mineral Land Tax Act* and obviously the definition of mineral changes over time, given the interpretation that the Courts have put on “mineral” in its “vernacular sense” in the absence of clear statutory definitions of minerals.

In some instances, the Mineral Land Tax has been paid so that a party has retained mineral rights even though it may not own all of the mineral rights. This adds another level of complexity to determining ownership of subsurface rights.

The land title office records are also not necessarily clear in identifying lands where surrenders have taken place.

It is noted that at the time of the various railway land grants, certain lands were specifically excluded in the grants, such as pre-existing grants already having been made by the Crown. The railway grants and the legislation do not identify these parcels of land and relying on a map showing the size of the grant and the extent of the grant is fraught with risk since it would not identify lands already alienated by the Crown.

Reliance on computer generated searches is risky because often the drafter who puts the information together showing reservations of such things as undersurface rights and ownership of minerals may not have correctly identified the minerals that have been reserved and in some instances, has not identified reservations at all. There can be very subtle differences in the bundle of undersurface rights and in many instances the land title office in describing transfer of interests and reservations of interests because of the need for brevity, for the most part, has incorrectly identified the nature of the

undersurface rights which were never intended by the document reserving or granting such rights. It is critical that the actual document be examined and land title office records not relied on where there is concern with respect to ownership of undersurface rights.

Another problem is that over time land title office staff have changed and their familiarity with railway lands and the old Crown grants has faded with not just the passage of time but also the retirement of knowledgeable land title office staff in the area of railway lands.

The use of maps to show interests in the lands rather than registration against specific parcels for the most part, was enshrined in legislation and this in itself can create uncertainty with respect to the ownership of surface and subsurface rights.

Superimposed on this level of complexity are the various statutes under which grants were made, not only the land acts but also the mineral acts and it goes without saying that the definition of minerals has obviously changed overtime.

2.0 COALBED GAS ACT

In April 2003, the Provincial Government brought in legislation dealing with coalbed methane in the form of the *Coalbed Gas Act*.

The definition of coalbed gas is a broad one and references coalbed gas within subsurface coal deposits and any reservoirs in communication with the coal deposits. Coalbed gas is further defined as a natural gas as defined in the *Petroleum and Natural Gas Act*.

The legislation states that natural gas has always been considered to be a mineral and that coalbed gas has always been considered as a natural gas.

Under section 5 of the legislation the Minister can issue natural gas tenure of coalbed gas rights to any persons with respect to a specified coal deposits underlying parcel.

As a result of the legislation there is no right to compensation or claim for damages where a party alleges that the coal right held by it also include the coalbed methane.

3.0 COALBED METHANE ACQUISITIONS AND POLICIES

3.1 Acquisition of Coalbed Gas Tenures

There are two methods to acquire rights to natural gas which includes coalbed methane and one is through the monthly auction process and the second to acquire under Sections 71 and 72 of the *Petroleum Natural Gas Act*.

Under Section 72(2) of the PNG Act, the Minister may issue natural gas tenure for coalbed gas rights with regard to any specified coal deposits underlying a parcel.

In order to acquire coalbed gas rights in British Columbia, you must first apply for petroleum natural gas tenure. However, activities such as geophysical activities or drilling test holes may be carried out prior to receiving tenure. However, any proponent must first apply to the Oil and Gas Commission for approval to carry out such activities.

Applicants must get approval from the Oil and Gas Commission for activities such as drilling, seismic surveys and road construction and there is a requirement in British Columbia to consult with First Nations where the gas activities may impact First Nations and where private land is involved access agreements would be required with the private land owner.

There is a monthly auction procedure in British Columbia and the Oil and Gas Commission conducts these auctions and gas rights can be obtained in that manner.

Under Section 72 of the PNG Act [check Oil and Gas Activities Act], the government can issue tenure by way of an order in council, however, there is a consultation process and a referral process including consultation with Ministries of Forests, Environment, Transportation and a number of other ministries.

3.2 Access

In the event that the landowner and the applicant cannot agree on access, there is provision under the PNG Act to obtain access by way of an application to the Mediation and Arbitration Board. The normal procedure is that the Board will first attempt to mediate the matter in dispute between the parties with respect to access and compensation and failing the mediation process, it then goes to arbitration which is binding on the parties. The arbitration order has the effect of being an Order of the Supreme Court of British Columbia and as such they are enforceable in that manner. The process for the arbitration is a relatively informal one and it mirrors similar the Alberta provisions.

Each party can be represented by counsel, call evidence with respect to the impact of the access, the value to be placed on the lands affected by the access whether it is roads or drill sites or potentially pipelines or gathering systems. The evidence at such hearings is relatively informal although witnesses are sworn and opportunity exists to cross examine witnesses.

3.3 Spacing for Coalbed Methane Wells

The general spacing requirements for natural gas wells are not applied in the case of coalbed methane wells and normally the well spacing is determined at a relatively early stage. Up to eight wells per section can be utilized on Crown lands however only four wells per section are allowed on private lands.

There are also rules with respect to the disposition of water and generally injection wells are required where water is produced from CBM development.

Most CBM projects require huge areas of land and as a result of the requirement because of the low pressure and relatively low production rates the wells are more likely to be in fields of 100 wells or more.

3.4 Coalbed Methane Guidelines

The Oil & Gas Commission has issued guidelines for coalbed methane projects in British Columbia dated October 2002 and the guidelines are organized by topic area as follows, geophysical exploration, well approvals, drilling and well servicing, gathering system and pipelines, production and abandonment and reclamation.

There is a single window review of geophysical exploration programs with references to regional offices.

The Crown treats the acquisition of rights the same as acquisition of conventional natural gas rights. There are three types of tenure agreements used in the Province (1) permits which carry an obligation to conduct exploration, (2) drilling licences convey the exclusive right to drill wells in a defined area, and (3) leases which provide exclusive drilling rights and allow production.

There is a right of entry for service access to Crown land, however, private lands are subject to reaching an agreement with a private land owner or failing that an application would be made to the

mediation and arbitration board established under the *Petroleum and Natural Gas Act* to determine the access rights, payments, bonding, etc.

There is provision for the waiving of spacing requirements for schemes approved for coalbed methane development and production and there is a fee of approximately \$8,000 for each well authorization. This is the same fee that applies for conventional natural gas wells even though the spacing units are obviously greater for conventional wells.

In order to be eligible for well authorization a company must be registered with the B.C. Registrar of Companies, a drilling deposit is required, a comprehensive general insurance policy must be in place and there must be a licence to cut issued by the forest district for cutting Crown timber.

There is an obligation to consult with the public and First Nations.

Test holes can be drilled by no production is allowed from test holes and information from test holes can be kept confidential for a three year period.

Up to eight wells per section can be drilled, however, fewer wells per section on private lands are allowed. There is provision for confidentiality for a period of three years after the Ministry receives the well data or well report and test hole data is confidential for three years following the rig release date.

Any gathering systems and pipelines must meet the requirement of the *Pipeline Act* and Pipeline Regulation in order to ensure the safety of the facility and protection of the public and the environment.

Reports are required to be submitted every six months for experimental coalbed methane schemes and certain data is required, such as daily average rates of production, monthly cumulative gas and water production, well water sampling every six months, any well treatment or workovers, information with regard to gas content, desorption analysis, injectivity tests and permeability of coal seams and such other information as in the opinion of the Oil & Gas Commission may be required.

The low productivity royalty rate has increased to 600,000 feet per day from 180,000 feet per day to address lower production rates and there is a \$50,000 royalty credit due for wells which has been renewed for each of the last five years.

4.0 OIL & GAS ACTIVITIES ACT

This Act received royal assent on May 29, 2008, however, only certain sections of the act came into force on June 27, 2008 and these deal principally with definitions amending the *Petroleum and Natural Gas Act* and certain drilling rights, reservoir rights and related matters. The balance of the Act has yet to be proclaimed in force.

The Act as been designed to replace the *Oil & Gas Commission Act* and broaden the authority of the Oil & Gas Commission as well as strengthening its level of autonomy.

The role of the Minister of Energy, Mines and Petroleum Resources has also been diminished as the Act grants the Commission permissive authority to establish committees for any purpose.

In addition, the Act provides the Commission with the authority over oil and gas activities in dealing with specified enactments such as the *Environmental Act*, the *Forest Act*, the *Heritage Conservation Act*, the *Land Act* and the *Water Act*.

The Act further provides for a comprehensive process through which permits to engage in oil and gas activities can be obtained through the Commission.

The protection of land owners, other than those who hold fee simple interest in the permitted site has been introduced in the Act and before a party can even apply for a permit for oil and gas activities, an agreement with the addressed the land owner must be reached under section 24. There is a 15 day appeal period.

An oil and gas appeal tribunal was established and decisions from the tribunal may be appealed. There is authority in the Commission to order any conditions it considers necessary to ensure permit holders comply with the stated goals of environmental protection. Permit holders are solely responsible for spillage and face liability if they are unable to control it and the Commission may take or deal with a spillage and put any proceeds towards the expenses incurred to deal with the spillage.

The Commission has the right to restore orphan sites and seek compensation for the owners for any costs incurred.

The Commission has the right to impose administrative financial penalties for contraventions of the Act including imprisonment and significant financial penalties.

The Act would result in the repeal of the *Pipeline Act* and shift responsibility for pipeline activities to the Commission. In the *Pipeline Act*, permit holders could appropriate land if required for the construction of a pipeline, however, these provisions have not been adopted in the Act and permit holders must engage in negotiation and acquire rights to land if oil and gas activity is to take place.

The Commission has also assumed a much greater responsibility for the oversight of geothermal resource development in the Province.

5.0 LOCAL GOVERNMENT REGULATION OF COALBED METHANE DEVELOPMENT

A number of municipalities and regional districts are creating bylaws and policies with regard to potential coalbed methane development within their boundaries. There are issues with respect to such bylaws and policies since there may well be direct conflicts with existing provincial legislation and this matter is yet to be addressed by the courts.

A number of groups have opposed coalbed methane development in the province, particularly in the southeast section and now in the northeast section of the province in the Peace River area.

A number of suggestions have been made by opponents including plans for zoning requirements in order to curtail coalbed methane exploration and development and it is not clear how the ultimate result of this apparent conflict between regulatory schemes will unfold although it is presumed that the provincial government would enact legislation and policies which would have the effect of reducing the impact of any zoning or policies of regional districts or municipalities if such zoning requirements prevent development.

6.0 RESOURCE ROAD ACT

First reading was given to the *Resource Road Act* on April 16, 2008 and the Act was the subject of significant industry scrutiny principally because of the concerns that a number of industrial road users had with respect to the proposed legislation.

A steering committee was established to address this matter several years ago. The purpose of the Act was to address the uncertainty regarding tenures on forest roads, inconsistent standards, exaggerated environmental footprints, administrative complexity, inter-industry friction and smarter regulation.

The statute is designed to incorporate provisions of the *Land Act* and regulations, the *Forest and Range Practices Act* and the *Petroleum and Natural Gas Act* and regulations as well as the *Mining Right of Way Act* and *Industrial Roads Act*.

Like many statutes, the detail will be in the regulations and no regulations are available to date. It is anticipated that the government will be reintroducing the Bill at the next session of the legislature.

Existing permits and authorizations will be valid during the transition period of up to three years and access for the public would be unchanged.

The intent of the legislation is to provide consistent administration across industries, to create a resource road authority, address road use safety, provide notice of any deactivation.

The principle purpose is to regulate road users who have material impacts on road maintenance and also to create a dispute settlement mechanism. Commercial users will be required to have a permit and thresholds are intended to draw distinctions between light commercial and heavy commercial usage. At present the Ministry is conducting stakeholder consultation in order to make the public more aware of the legislation and also to seek input with regard to the formation of regulations under the Act.

7.0 FIRST NATIONS CONSULTATION

7.1 Taku River Tlingit First Nation v. Ringstad et al.

The Provincial Ministers issued a Project Approval Certificate (the “Certificate”) under the *Environmental Assessment Act* (“EAA”) permitting the reopening of the Tulsequah Chief Mine Project in Northwestern British Columbia, including the construction of a 108 km access road.

During the assessment process, Taku River Tlingit First Nation (the “Tlingit”) had expressed concerns over the reopening of the mine and the building of the access road, which would cross part of their traditional territory. They were concerned about the impact on their culture and habitat as well as on their treaty negotiations. They participated in a Project Committee set up under the EAA until December 1997 when that process was “abruptly truncated”.

The Tlingit sought judicial review of the Ministers’ decision and in June 2000, the British Columbia Supreme Court quashed the decision and referred the matter back to the Ministers for reconsideration. The reconsideration was to occur once a revised Project Committee report, which

meaningfully addressed the concerns of the Tlingit, had been completed and delivered to the Ministers. The Crown appealed to the Court of Appeal.

The Court of Appeal determined the central issue of the appeal was whether the Ministers, during the Certificate approval process, had an obligation to take into account the constitutional protection afforded to aboriginal rights under Section 35(1) of the *Constitution Act, 1982* even though the Tlingit had not yet established any aboriginal rights or title to the area. The issue of proof of aboriginal rights and title had been severed from this court proceeding.

The Court of Appeal held that the government has a responsibility, as a result of the special trust relationship created by history, treaties and legislation, to protect the rights of Indians.

The Supreme Court of Canada in a hearing in October 2003 upheld the Court of Appeal decision and ruled that the Crown had a duty to consult and accommodate First Nations.

7.2 Council of the Haida Nation v. British Columbia and Weyerhaeuser

In August of 2002, the British Columbia Court of Appeal ruled that there was a duty imposed upon third parties to consult with aboriginal communities when aboriginal title to land is being claimed and prior to activity being taken on the lands to which aboriginal title is asserted.

The Haida claim aboriginal title to large portions of Haida Gwaii (the Queen Charlotte Islands). The Ministry of Forests originally granted a Tree Farm License (“TFL”) to MacMillan Bloedel who later transferred it to Weyerhaeuser. The TFL was replaced in 1981, 1995 and 2000. The TFL covers portions of Haida Gwaii.

The Haida brought a judicial review application seeking a declaration that the replacements were invalid on the basis that the Crown could not validly issue the replacements on land that is encumbered by aboriginal title or to which aboriginal title is claimed. The issue of whether the Haida have aboriginal title to the land in question was deferred to trial. However, the judicial review application proceeded on the issue of whether adequate consultation had occurred in issuing the TFL replacements.

The chamber's judge held that there was no legal or equitable duty of consultation because the duty of consultation only arises in the face of proven, and not merely asserted, aboriginal rights and title. Earlier in the year, the Court of Appeal reversed the chambers judge and held that the duty to consult arises even where there is an asserted but not yet proven claim to aboriginal title and that the Crown

had breached its fiduciary duty to consult prior to issuing the replacements. In addition, the Court of Appeal held, without argument on the point or analysis, that Weyerhaeuser had a legally enforceable duty to consult with the Haida in good faith and that it had breached this duty.

The Supreme Court of Canada in a hearing in October of 2003 ruled that while there was a duty on the Crown to consult and accommodate First Nations, such a duty did not apply to project proponents.

8.0 COALBED GAS ACT

[SBC 2003] Chapter 18

Assented to April 10, 2003

Contents

Section

- [1. Definitions](#)
- [2. Natural gas is a mineral](#)
- [3. Coalbed gas is natural gas](#)
- [4. Natural gas tenure includes coalbed gas](#)
- [5. Minister may issue natural gas tenure of coalbed gas rights](#)
- [6. No compensation or right of action](#)
- [7. Exception for safety reasons](#)

Definitions

1 In this Act:

“**coal**” means a combustible sedimentary rock, other than peat, composed of altered and hardened carbonized vegetable matter, but does not include coalbed gas;

“**coal disposition**” means a disposition of coal;

“**coal owner**” means a person who holds a coal tenure or a coal disposition;

“**coal tenure**” means any lease or licence under the *Coal Act*;

“coalbed gas” means all substances

- (a) that can be recovered to the surface through a wellbore from subsurface coal deposits and any reservoirs in communication with the coal deposits, and
- (b) the volume of which, if measured at the surface immediately following that recovery, would be measured as a gas;

“disposition” means any patent, title, deed, notification, conveyance, agreement, transfer, surrender or other documents granting or reserving any right, title, estate or interest in fee simple to a parcel;

“natural gas” means natural gas as defined in the *Petroleum and Natural Gas Act*;

“natural gas disposition” means a disposition of natural gas;

“natural gas owner” means a person who holds a natural gas tenure or natural gas disposition;

“natural gas tenure” means any lease, licence or permit under the *Petroleum and Natural Gas Act* or other rights acquired under section 72 (2) of that Act in respect of petroleum and natural gas, or of natural gas only;

“parcel” means the area of land specified in

- (a) a coal tenure,
- (b) a natural gas tenure, or
- (c) a disposition from the Crown;

“surface owner”, in respect of a parcel, means a person who is the registered owner of the land surface.

Natural gas is a mineral

2 Natural gas must be considered to be and to have always been a mineral.

Coalbed gas is natural gas

3 (1) Coalbed gas must be considered to be and to have always been natural gas.

- (2) This section does not affect a provision contained in any disposition subsequent to the original disposition from the Crown by which a natural gas owner of a parcel specifically grants coalbed gas rights to
 - (a) the coal owner in that parcel, or
 - (b) any person holding coal rights in that parcel through the coal owner.

Natural gas tenure includes coalbed gas

- 4 (1) A natural gas tenure, whether made before or after the coming into force of this Act, includes any coalbed gas rights.
- (2) A coal tenure, whether made before or after the coming into force of this Act, does not include any coalbed gas rights.

Minister may issue natural gas tenure of coalbed gas rights

5 Under section 72 (2) of the *Petroleum and Natural Gas Act*, the minister may issue a natural gas tenure of coalbed gas rights to any person with respect to specified coal deposits underlying a parcel.

No compensation or right of action

- 6 (1) A person has no right of action and must not commence or maintain proceedings, as a result of the enactment of this Act or the exercise by the minister of powers referred to in section 5 or 7,
 - (a) to claim damages or compensation of any kind from the government, or
 - (b) to obtain a declaration that damages or compensation are payable by the government.
- (2) For all purposes, including for the purposes of the *Expropriation Act*, no expropriation or injurious affection occurs as a result of the enactment of this Act or the exercise by the minister of powers referred to in section 5 or 7.
- (3) The natural gas owner or a person who has acquired coalbed gas rights from the natural gas owner has no right of action and must not commence or maintain

proceedings against the government, the surface owner or the coal owner for damages or compensation because of extraction, production or removal of coalbed gas if that extraction, production or removal occurred before the coming into force of this Act.

Exception for safety reasons

7 If the minister is satisfied that it is necessary to do so for safety reasons, the minister may, by regulation, authorize coal owners or the holders of Crown coal dispositions to vent or dispose of coal bed gas as directed.

Prepared by:

Brian E. Abraham
Fraser Milner Casgrain LLP
15th Floor, 1040 West Georgia Street
Vancouver, BC V6E 4H8

Telephone: 604-443-7134
Facsimile: 604-683-5214
brian.abraham@fmc-law.com

Lawyers in:

Montréal

Ottawa

Toronto

Edmonton

Calgary

Vancouver

New York



FRASER MILNER CASGRAIN LLP

www.fmc-law.com