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CHANGES TO NATIONAL INSTRUMENT NI 43-101: STANDARDS OF DISCLOSURE FOR MINERAL PROJECTS

By: Laurel M. Petryk of McMillan LLP. Laurel Petryk is an Associate in McMillan's Vancouver office, and may be reached at laurel.petryk@mcmillan.ca or 604.691.7480. This article first appeared in McMillan's MINING AND CAPITAL MARKETS BULLETIN, *dated May 2011 and available on McMillan's Web site at www.mcmillan.ca. This article is reprinted with permission. © McMillan LLP.*

On June 30, 2011 amendments to National Instrument 43-101 *Standards of Disclosure for Mineral Projects* ("NI 43-101") will become effective. There will be an updated and more flexible rule ("New NI 43-101") in place for mining issuers. New NI 43-101 reflects issuer and regulator experience with NI 43-101, and changes in the mining industry that have occurred over the years.

New NI 43-101 Allows Issuers to go to Market Without a Technical Report – In Most Circumstances

Under New NI 43-101, the trigger to file a technical report when filing a preliminary short form prospectus ("Short Form Prospectus") has been relaxed. It is currently the case that an issuer must file a technical report in connection with a Short Form Prospectus, if the Short Form Prospectus contains new material scientific or technical information not contained in a previously filed technical report. This trigger is easy to hit: either because an issuer clearly has new scientific or technical information; or, an issuer is unsure if the securities regulators will agree that its technical reports on SEDAR are current at the time the Short Form Prospectus is filed. The result being [that] issuers usually have to file at least one technical report in connection with a Short Form Prospectus.

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With New NI 43-101, an issuer must file a technical report with a Short Form Prospectus if the Short Form Prospectus discloses, for the first time, mineral resources, mineral reserves, or the results of a preliminary economic assessment that constitutes a material change in relation to the issuer, or a change in this information, if the change constitutes a material change in relation to the issuer. The securities regulators have said that in most cases, they think that first time disclosure of mineral resources, reserves, or the results of a preliminary economic assessment on a property material to the issuer will constitute a material change in the affairs of the issuer. Note that if disclosure of this information was made within 45 days of filing the Short Form Prospectus, and no technical report was filed in support, then a current technical report would have to be filed with the Short Form Prospectus.

Currently, if an issuer were describing for the first time a material property in a Short Form Prospectus (with or without a resource or reserve estimate or preliminary assessment), the issuer would be required to file a technical report at the same time as filing its Short Form Prospectus. Under New NI 43-101, the issuer would not have to file a technical report to support the scientific or technical information at the same time as the Short Form Prospectus, unless the Short Form Prospectus disclosed for the first time mineral resources, mineral reserves, or the results of a preliminary economic assessment that constitutes a material change, or a change in this information, if the change constitutes a material change.

New NI 43-101 should result in significantly less technical reports being filed in connection with Short Form Prospectus offerings. Also, these changes remove a significant uncertainty as to whether securities regulators reviewing the Short Form Prospectus would consider previously filed technical reports still current and suitable to support disclosure in the Short Form Prospectus. Issuers should therefore be able to access markets more quickly, and with less uncertainty about the outcome of the regulatory review, under New NI 43-101.

New NI 43-101 Changes How Historical Estimates are Treated

The definition of historical estimate has changed under New NI 43-101. It now means "an estimate of the quantity, grade, or metal or mineral content of a deposit that an issuer has not verified as a current mineral resource or mineral reserve, and which was prepared before the issuer acquiring, or entering into an agreement to acquire, an interest in the property that contains the deposit". There is no longer a calendar date (i.e., Feb 1, 2001) to make an estimate historical under New NI 43-101.

If an issuer treats the historical estimates as historical and complies with New NI 43-101, no technical report will be triggered (this has remained the same as under NI 43-101). What has changed under New NI 43-101, is the time limit for filing a technical report when an issuer treats historical estimates as current. Under New NI 43-101, the time limit has been extended to six months, subject to the caution set out below.

New Six Month Time Limit to File Technical Report and Related Pitfall

Under New NI 43-101, issuers will have up to six months to file a technical report (subject to the caution set out below), when the issuer discloses information that requires a technical report to be filed under New NI 43-101 in a document that would not otherwise immediately trigger a technical report (e.g., press release), and the disclosure is, among other things, supported by a technical report filed by another issuer that holds or held an interest on the same property. The document would contain first time disclosure by the issuer that acquired the interest in the property of mineral resources, mineral reserves, or the results of a preliminary economic assessment that constitutes a material change in relation to the issuer.

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For CCH Canadian Limited

MONICA LIM, B.A. (Hons.), CPE & LPC (U.K.),
Solicitor (U.K.), Writer
(416) 224-2224, ext. 6438
e-mail: Monica.Lim@wolterskluwer.com

RITA MASON, LL.B., Director of Editorial
Legal and Business Markets
(416) 228-6128
e-mail: Rita.Mason@wolterskluwer.com

MIKE MOORE, Director of Sales & Marketing
(416) 228-6132
e-mail: Mike.Moore@wolterskluwer.com

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Issuers should be aware that it will be easy to have the six month deadline in mind and forget that it can be shortened if an issuer hits another trigger to file a technical report under New NI 43-101 before the six months is up. For example, in the context of an acquisition, if an issuer discloses, in a press release for instance, resource estimates on a property [that] it is set to acquire, and that information constitutes a material change in the affairs of the issuer, under New NI 43-101 the issuer has six months from the date of the press release to prepare and file its own technical report on the property, as long as there is a technical report on SEDAR that supports that information. However, if the issuer then includes this information in an information circular or annual information form ("AIF") one month later, the six month deadline is shortened to the date it files its information circular or AIF.

These are not the only examples when the six month deadline will be abridged. An issuer must be aware of all of the triggers that will shorten this time period as set out in New NI 43-101.

Changes Related to Qualified Persons ("QPs")

More flexibility in disclosure of scientific or technical information

Currently, all disclosure of scientific or technical information made by an issuer must be prepared by or under the supervision of a QP. Under New NI 43-101, this scientific or technical information is no longer required to be prepared or supervised by a QP, as long as it is approved by a QP. For example, an issuer disclosing scientific and technical information taken from a technical report in a news release would no longer be required to name the QP author in the news release as having prepared or supervised the information. New NI 43-101 allows, as an alternative, a QP employee of the issuer to be named as approving the content in the press release.

QP consent requirements are more relaxed under new NI 43-101

Some changes in New NI 43-101 that facilitate QP consents include:

(i) QP consents are limited to parts of the technical report that the QP prepared;

(ii) QP consents must identify the disclosure that it supports;

(iii) in-house QP can approve later disclosure (see example below); and

(iv) updated QP consents and certificates are not required where issuers rely on previously filed technical reports and there is no new material scientific or technical information (see example below).

Regarding subparagraph (iii) above, this means [that] issuers are not required to get the original QP that prepared a technical report to sign off on technical information that is based on that technical report and presented in a later disclosure document. For example, if an issuer filed a technical report in connection with resource estimates disclosed in a press release, and the issuer then uses that same information in their AIF, the issuer does not need to name the author of the original technical report as having prepared or supervised the preparation of the technical disclosure in the AIF. Instead, they can get their own in-house QP to review and approve the disclosure.

Regarding subparagraph (iv) above, this means that if an issuer already has a technical report on file that supports scientific or technical information in a document the issuer is now filing (e.g., press release, AIF, information circular, takeover bid circular, offering memorandum, etc.), and there is no new material information on the property (i.e., the technical report is still current), no technical report is triggered under New NI 43-101. Therefore, no additional QP consents are required.

Consequential amendments to short form prospectus distributions

In addition to NI 43-101, the prospectus rule NI 44-101 Short Form Prospectus Distributions ("NI 44-101") requires QPs to be named in the Short Form Prospectus as experts, and requires a written consent from those named QPs. Currently, issuers spend a lot of time trying to locate QPs for written consents when it comes time to file a Short Form Prospectus, or final short form prospectus if they are relying on a previously filed technical report. This often proves challenging, as QPs are frequently in remote locations and difficult to locate.

Consequential amendments to NI 44-101 also to come into effect June 30, 2011, allow issuers to file expert consents of the QPs by an authorized signatory of the company that employed or employs the QP instead of the QP himself or herself, if:

- the qualified person's consent is required in connection with a technical report that was not required to be filed with the Short Form Prospectus;
- the qualified person was employed by a person or company at the date of signing the technical report; and

- the principal business of the person or company is providing engineering or geoscientific services.

A consent filed under the proposed amendments to NI 44-101 must be signed by an individual who is an authorized signatory of the person or company. Also, this individual must fall within the definition of "qualified person" (which has been revised) under New NI 43-101, except for the requirement to have experience relevant to the subject matter of the mineral project and the technical report.

Other changes related to QPs

New NI 43-101 contains other changes related to QPs. These include not requiring independence for QPs when preparing technical reports for issuers listed on certain exchanges upon becoming a reporting issuer in Canada, and the expansion of foreign codes allowed to be used in technical reports and other disclosure, by foreign issuers or Canadian issuers with foreign properties. In addition, the list of acceptable associations for QPs has been revised under New NI 43-101.

New NI 43-101 Tailors Technical Reports to the Stage of Development of Project

The technical report form under New NI 43-101 is less prescriptive and gives more discretion to the QP on form content details. Under New NI 43-101, the technical report content requirements are different, depending on the stage of development of the subject property. For example, there are different requirements for illustrations in technical reports under New NI 43-101 for "exploration project", "advanced properties other than properties under development", and "properties under development or in production".

The "advanced property" definition is new, and means: "a property that has (a) mineral reserves, or (b) mineral resources the potential economic viability of which is supported by a preliminary economic assessment, a pre-feasibility study or a feasibility study".

In reality, however, when preparing the content of technical reports, there are four levels of development of mineral properties recognized, each with different allowances and requirements under the new technical report form: (i) exploration without mineral resources, (ii) exploration with mineral resources, (iii) advanced properties and producing properties with a planned material expansion, and (iv) producing properties with no material expansion planned (see below).

Under New NI 43-101, producing issuers are exempt from including economic analysis in technical reports on properties currently in production, unless the technical report includes information on a material expansion of current production. This will provide relief to producing issuers who often do not want to provide this sensitive information in publically available technical reports.

Other Changes Under New NI 43-101

Issuers holding royalty interests will be exempt under New NI 43-101 from filing technical reports if the owner or operator of the property is a reporting issuer in Canada. Producing issuers listed on a specified exchange who have disclosed scientific and technical information that is material to the royalty holder will also be exempt under New NI 43-101.

In addition, gross value of metal or mineral in a deposit or a sampled interval or drill intersection is prohibited under New NI 43-101. As well, metal or mineral equivalent grade for a multiple commodity deposit, sampled interval or drill intersection is prohibited, unless the grade for each material or metal used to establish the equivalent grade is also disclosed.

Finally, there are other small changes in New NI 43-101 that, together with the changes described in this article, should make New NI 43-101 more flexible and easier to deal with for issuers, once issuers understand how to take advantage of these changes.

CANADIAN DEVELOPMENTS

Federal

Canada Rejects New Kyoto Protocol

Canada confirmed at the United Nations ("UN") climate talks in Bonn, Germany on June 8th that it would not support an extended Kyoto Protocol after 2012. "Now that we've finished our election we can say now that Canada will not be taking a target under a second commitment period of the Kyoto Protocol", stated Judith Gelbman, a member of Canada's delegation. Canada joins Japan and Russia in rejecting a new round of Kyoto, and European nations are now suggesting that they will not sign on to the Protocol unless emerging economies take strong targets under a new deal, thereby putting the future of the Kyoto Protocol in jeopardy. While the Protocol might continue to exist, there is a "real risk that it may become an empty shell with no targets, thereby creating a regulatory gap

post-2012", said UN Framework Convention on Climate Change ("UNFCCC") secretariat top official Christiana Figueres.

The UN climate negotiations ran from June 6 to June 17, 2011, and were intended to pave the way towards the 17th Conference of the Parties ("COP 17") to be held in late November and early December 2011, in Durban, South Africa. The Bonn talks were to discuss setting emissions reductions for developed and developing nations, securing funding and technology to help developing nations adapt to climate change, and to determine how emissions reductions will be measured, reported, and verified. The priority at the COP 17 climate talks has been identified by the lead spokesman for 130 developing nations and China, Jorge Arguello of Argentina, as the extension of the Kyoto Protocol.

With an increasing rift between developing countries (which have no obligations under the Kyoto Protocol and which want the commitments binding current Kyoto Protocol nations to be extended for a second period with deeper targets) and wealthy countries (which want large emerging economies including India and China to accept parallel legal obligations or at least to lower their emissions growth), it seems unlikely that any solutions to curb rising global greenhouse gas ("GHG") emissions will result from the UNFCCC process.

Climate Change Awareness and Opinions Contrasted

A more aggressive Canadian approach to GHG emissions continues to be urged by the New Democratic Party ("NDP") in its capacity as the Official Opposition in the House of Commons. NDP Leader Jack Layton has been urging "hard emissions limits" through the establishment of a cap-and-trade policy under which companies or utilities which exceed limits would have to purchase emissions credits auctioned by the federal government and then trade them on a commodities exchange. Mr. Layton wants an initial price of $45 a tonne of carbon dioxide equivalent, which he says would enable Canada to meet its stated goal of a 17% reduction in emissions from 2005 levels by 2020.

The Conservatives, however, continue to insist that Canada must await a decision by the United States, because a "go-it-alone" approach would be economically disastrous. The Conservatives campaign platform for the recent May election cited the government's stated goal, but only committed to "continue taking action on climate change". Although they had proposed targets for coal-fired generating stations and said that they would continue to regulate industrial emissions on a sectoral basis, it was critical to remain in step with the United States.

Against that backdrop, a report by a trio of political scientists has concluded that, while there are "considerable" similarities in the two countries *per capita* emissions and that both federal governments have "substantial" difficulties in achieving policy consensus, Canadian and American public opinion diverges, "often quite significantly". Commissioned by two Canadian institutions, the Public Policy Forum (**www.ppforum.ca**) and Sustainable Prosperity (**www.sustainableprosperity.ca**), the report – *Climate Compared: Public Opinion on Climate Change in the United States & Canada* – is based on random telephone surveys involving 916 Americans and 1,214 Canadians in recent months.

"For much of the last decade, public opinion polls have shown that Americans have increasingly acknowledged the existence of climate change", say its authors, Érick Lachapelle of the University of Montreal, Christopher Borick of Muhlenberg College in Pennsylvania, and Barry Rabe of the University of Michigan. "This growth in belief was particularly pronounced between 2007 and 2008 … but this trend shifted markedly in more recent years. Numerous surveys … have shown a declining percentage of Americans expressing belief that temperatures on Earth have been increasing. In this study we find a slight rebound in levels of belief among U.S. residents with belief levels increasing from 52% to 58% between March and December 2010."

Canada presented "a very different case", as polling indicated "greater belief in the existence of global warming than has ever emerged" in the United States. "Four out of five Canadians currently believe that the Earth is warming compared with about three in five Americans", the authors say. "In addition, Americans were almost twice as likely as Canadians to indicate a belief that climate change was not occurring." They also say that among respondents in both countries who believe in climate change, there was "general belief" that it is a "very serious problem", but when political affiliations were examined, 64% of Conservatives in Canada and 69% of U.S. Republicans were less likely to believe in climate change.

The polling process also examined respondents' attitudes about their government's responsibilities. "Throughout the world, increasing attention has focused on the role of governments at both national and sub-national levels", the authors say. "Within such federal systems as the United States and Canada, sub-national governments have played an increasingly important role in adopting and implementing climate policies. Though placing a general responsibility on the federal level, both the Canadian and American public indicate a belief that

national, state, and local governments all have a responsibility to address global warming." That said, 60% of Canadians were more likely to have their governments assume a "great deal" of responsibility compared with 43% of Americans. Lacking federal leadership, both samples agreed that provincial and state governments had to take the initiative and should not be deterred by any inaction by neighbouring jurisdictions.

Insofar as market-based solutions such as cap-and-trade were concerned, respondents' views diverged "somewhat" on willingness to pay for increased production for renewable energy sources: 21% of Canadians compared with 41% of Americans. Presented with carbon cost scenarios, the Canada/U.S. percentage splits were 28/26 at $1–49 a year, 19/17 at $50–99, 13/7 at $100–249, 6/4 at $250–499, and 7/2 at $500 or more. Canadians were more receptive to cap-and-trade and taxes – 58% compared with 39% – even at costs of up to $50 a month.

Alberta

New CCS Regulation Issued

The Province of Alberta issued a new regulation on April 28, 2011 under the *Mines and Minerals Act*, which sets out the process that companies must use to seek tenure rights to evaluate potential deep carbon storage sites for the storage of carbon dioxide. The *Carbon Sequestration Tenure Regulation* (Alberta Regulation 68/2011):

- Establishes a five-year evaluation permit to determine storage site suitability;
- Establishes a 15-year sequestration lease for longer term commercial needs;
- Requires permit and leaseholders to submit monitoring, measurement, and verification plans, which must be approved by the Minister and updated every three years;
- Sets out requirements for closure plans and requires leaseholders to submit closure plans which must be approved by the Minister and updated every three years;
- Sets annual rental rates and application fees for permits and leases;
- Establishes the minimum carbon dioxide injection depth at one kilometre; and
- Establishes the maximum area for permits and leases at 73,728 hectares.

Companies must continue to work with landowners to obtain surface access and with the Energy Resources Conservation Board to obtain required approvals.

The regulation may be accessed at http://www.qp.alberta.ca/574.cfm?page=2011_068.cfm&leg_type=Regs&isbncln=9780779757350.

Reclamation Certificate Information Available Online

Over 100,000 land reclamation certificate records are now available through an online searchable database on the Environmental Site Assessment Repository at www.esar.alberta.ca. The Repository also houses individual site assessment information and sites where an environmental site assessment has been completed as a result of a land purchase agreement.

More information on accessing public environmental documents is available at http://environment.alberta.ca/01405.html.

New Brunswick

Input on Proposed *Species at Risk Act* Sought

New Brunswick's Department of Natural Resources is seeking comments on a proposed *Species at Risk Act* which would replace the existing *Endangered Species Act* and which is intended to provide an improved approach to identifying, recovering, and protecting species at risk within the province. Some of the main elements of the proposed *Species at Risk Act* are as follows:

- Identifying species at risk: An independent committee would be established to assess the status of species believed to be at risk. Placement of a species on the new listing regulation would trigger recovery planning and protection assessment processes.
- Recovery planning for species at risk: Management plans would be prepared for species listed as a special concern, and a recovery strategy would be prepared for species listed as extirpated, endangered, or threatened.
- Protection of species at risk: A protection assessment for species listed as extirpated, endangered, or threatened would be conducted, involving consulting with provincial and federal departments, landowners, the public, Aboriginal communities, and other affected groups. Species categorized as extirpated, endangered, or

threatened could be placed under a prohibitions regulation, and habitat could be afforded protection through a habitat designation regulation. The proposed Act would not provide for compensation to owners of land that would be designated as habitat for species at risk; however, protection of habitat on private land would not be recommended unless habitat on Crown land is insufficient to meet the needs of the species. Emphasis would be placed on working with landowners and stakeholders to conserve habitat by voluntary means and through the use of other tools to protect the habitat.

- Transitional provisions: Species currently listed in the existing *Endangered Species Regulation* would be transferred to a new listing regulation without being subject to the assessment and listing processes of the new Act. Species not listed in the current *Endangered Species Regulation*, but which have been assessed nationally as extirpated, endangered, threatened, or of special concern, would also be added to the new listing regulation without being subject to the listing and assessment process set out in the new Act.

The comment period on the proposed Act is open to Friday, July 15th. Further information and the proposed Act are available at: http://www.gnb.ca/0078/Promo/SAR-e.asp.

Nunavut

Progress on Northern Climate Change Adaptation

The Government of Nunavut has released "Upagiaqtavut – Setting the Course, Impacts and Adaptation in Nunavut", which aims to assist organizations to become more resilient and adaptive to climate change. The document was developed by the Nunavut Department of the Environment in collaboration with other provincial departments, and through public consultations and partnership projects on climate change adaptation researched in Nunavut.

On April 28th, the Northwest Territories, Yukon, and Nunavut also released a pan-territorial climate change adaptation strategy entitled "The Pan-Territorial Adaptation Strategy: Moving Forward on Climate Change Adaptation in Canada's North", as well as the "Pan-Territorial Renewable Energy Inventory". Under the pan-territorial adaptation strategy, six approaches for supporting current and future climate change actions are identified, including to: source funding; collaborate with other governments; support communities; integrate adaptation; share knowledge and understanding; and develop and share tools, technology, and innovation. The pan-territorial adaptation strategy may be accessed at http://www.anorthernvision.ca/strategy/.

Ontario

Climate Change Adaptation Strategy Released

The Ontario government released "Climate Ready: Ontario's Adaptation Strategy and Action Plan 2011-2014" ("Climate Ready") at the end of April, based on recommendations provided by the Expert Panel on Climate Change Adaptation's 2009 report, "Adapting to Climate Change in Ontario" . The Panel, which had been appointed by the Ministry of the Environment in 2007, was composed of 11 leading scientists and environmental experts and sought to help Ontario understand, prepare, and plan for the impacts of changing climate on human health, the economy, environment, and infrastructure.

Climate Ready creates a vision and framework for collaboration across ministries and with external partners over the next four years, to 2014, and provides five broad goals and over 30 associated actions to help prepare Ontario for climate change. In Climate Ready, the province takes the view that adaptation to climate change entails both taking measures to reduce the negative effects of climate change as well as taking advantage of climate change's positive effects.

The five goals identified in Climate Ready are:

- Avoid loss and unsustainable investment, and take advantage of economic opportunities;
- Take reasonable and practical measures to increase climate resilience of ecosystems;
- Create and share risk-management tools to support adaptation efforts across the province;
- Achieve a better understanding of future climate change impacts across the province; and
- Seek opportunities to collaborate with others.

The first two named actions set out in Climate Ready are: (1) to mainstream adaptation by requiring consideration of climate change adaptation through creating new and updating existing legislation, policies, and programs on a province-wide basis; and (2) to create a governance and accountability structure for climate change adaptation through the establishment of a Climate Change Adaptation

Directorate to drive implementation of the Adaptation Strategy and Action Plan.

Ontario's plan includes actions across government to ensure that climate change adaptation will be integrated into financial and policy decisions. As part of the governance and accountability structure, Ontario will create a cross-ministry steering committee to support the Directorate and provide knowledge, advice, and official points of contact on adaptation across the Ontario Public Service. Additionally, the province will report annually to the public on actions contained in the Adaptation Strategy and Action Plan, while new actions will be brought through the Cabinet Committee process as appropriate and included as part of Ontario's Climate Change Annual Report.

Climate Ready may be accessed online at http://www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/@resources/documents/resource/stdprod_085423.pdf.

Smart Grid Fund Launched

As part of Ontario's Long-Term Energy Plan to build a clean energy future, the province launched a $50 million Smart Grid Fund ("SGF") on April 27th to provide targeted financial support to Ontario-based projects that are testing, demonstrating, and commercializing the next generation of smart grid solutions and building market competitiveness. "Smart grids" are defined in Ontario's *Green Energy and Green Economy Act, 2009* as "the advanced information exchange systems and equipment that when utilized together improve the flexibility, security, reliability, efficiency and safety of the integrated power system and distribution systems". Smart grid technology delivers electricity from the supplier to the homeowner using two-way digital communications, which helps consumers control electricity use and costs.

The SGF, which is a discretionary, non-entitlement program administered by the Ontario Ministry of Energy, comprises two project categories:

- Capacity-building projects that enable organizations to acquire and operationalize assets (but not early stage research) for developing and producing smart grid solutions, and that enhance Ontario's ability to manufacture and develop smart grid products, services, and solutions; and

- Demonstration projects (pilot-scale prototypes of smart grid technologies) in cooperation with local distribution companies. Such projects are intended to help identify risks, opportunities, and costs associated with integrating smart grid technology into the electricity system and to test whether specific technologies may be used on a larger scale.

Organizations that wish to apply for SGF financing must go through a two-stage application intake process. Projects must meet certain various eligibility criteria and funding is at the sole discretion of the province.

For more information on the SGF and SGF Guidelines (including eligibility criteria and application process), please see http://www.mei.gov.on.ca/en/energy/html/SGF_guidelines.html.

Quebec

Plan Nord Launched

As part of the Government of Quebec's prioritization of the North, the province launched Plan Nord on May 9th, a project that is set to be "one of the largest economic, social, and environmental development projects in Quebec's history". Plan Nord seeks to develop the province's economic potential and create wealth, and to achieve sustainable development in the energy, mineral resources, forest, wildlife, tourism, and bio-food production sector. Plan Nord was developed through the cooperation of a number of Quebec ministries and in consultation with Aboriginal and local communities.

Plan Nord covers all of Quebec's territory north of the 49th parallel – nearly 1.2 million km^2, and accounting for approximately 72% of Quebec's geographic area. The territory accounts for vast natural resources, including three-quarters of the province's installed hydroelectric power generation capacity, commercial forests representing more than 53% of the province's operable forests, outstanding wildlife resources, and many valuable mineral ore deposits.

Plan Nord will be implemented over a 25-year period and is expected to create approximately $80 billion in private and public investments towards the development of renewable energy, the mining sector, and public infrastructure. The Quebec government has undertaken to ensure that the projects are carried out with respect for the principles of sustainable development and are subject to rigorous environmental analyses. The government is making two additional commitments: (1) to ensure environmental protection in the territory covered by Plan Nord, and will ultimately be setting aside 50% of the territory for purposes other than industrial ones, environmental protection, and safeguarding biodiversity; and (2) to establish by 2015 a network of protected areas equivalent to at least 12% of the area of the territory.

Bills will be tabled shortly to create the Société du Plan Nord, a corporation that will coordinate the implementation of development projects under the Plan, as well as to establish the Fonds du Plan Nord – a special-purpose fund that will provide funding and into which tax spin-offs will be paid from new mining, new Hydro-Québec, and new infrastructure projects. Innovative funding will establish a direct link between economic activity triggered by Plan Nord and the resources invested to develop infrastructure and enhance social services for the inhabitants of the territory.

For more information on Plan Nord, please see http://plannord.gouv.qc.ca/english/index.asp.

Amendments to the *Mining Act* Tabled

The Quebec government tabled Bill 14, *An Act respecting the development of mineral resources in keeping with the principles of sustainable development*, on May 12th, to amend Quebec's *Mining Act* (R.S.Q., c. M-13.1). The amendments are a key measure under the province's recently launched Plan Nord (see above). Bill 14 follows a 2009 report by Quebec's Auditor-General criticizing the province's management of its mine rehabilitation regime, the release later that year of Quebec's Mineral Strategy, and initial amendments to the *Mining Act* proposed under Bill 79 in 2009 (and which had not been adopted when the National Assembly was prorogued earlier this year).

Bill 14, which provides explicitly that the Act must be construed in a manner consistent with the obligation to consult Native communities and that the Minister will have to consult Native communities specifically (depending on the circumstances), contains many amendments that had been presented in Bill 79, but also proposes a number of significant new amendments. Among these new amendments (amongst others) are provisions requiring:

- public consultations for new mines not subject to the environmental impact assessment process;
- more onerous requirements relating to the financial guarantee for mine rehabilitation and restoration;
- penalties against holders of inactive claims;
- elimination of the ability to apply excess work on a claim to more than nine renewal periods; and
- granting the Minister power to exclude certain zones from mining activities and to refuse the grant of certain types of mining rights to avoid conflicts with other uses.

Public consultations and public hearings on Bill 14 will be held by a Committee of the Quebec National Assembly on August 23, 24, and 25, 2011. To view Bill 14, please see http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-14-39-2.html.

Pesticide Use Ban Upheld in NAFTA Challenge

A 2006 ban by the Quebec government on the "cosmetic" use of the herbicide 2,4-D has survived a challenge by the chemical's principal manufacturer, Dow AgroSciences LLC of Indiana. Also, an agreement between the company and the federal government under the auspices of the *North American Free Trade Agreement* did not provide for at least $2 million in compensation the company had sought to cover a loss of business arising from the ban.

In exchange for the agreement, the Department of Foreign Affairs and International Trade said that the Quebec government "acknowledges Health Canada's conclusion that products containing 2,4-D do not pose an unacceptable risk to human health or to the environment, provided that the instructions on the label are followed". Trade Minister Ed Fast said the agreement also confirmed "the right of governments to regulate the use of pesticides" and said that "this right will not be compromised by Canada's participation in NAFTA or any other trade agreement".

In its 2009 Notice of Arbitration, Dow said Quebec's ban not only breached legal protections guaranteed to U.S. investors by NAFTA but was also "not based on science" and had been applied without "meaningful opportunity" for the company to make its case that the herbicide is safe. Canadian regulators say that 2,4-D, which is widely used for weed control, is safe if used according to directions. A 1996 U.S. Department of Agriculture review concluded that this type of herbicide, in use for decades, was "low in toxicity to humans and animals" and "no scientifically documented health risks, either acute or chronic, exist from … approved uses".

NORTH AMERICAN AND WORLD UPDATES

Canadian Members Reluctant To Join WCI Launch in 2012

The Western Climate Change Initiative ("WCI") is set to be launched on January 1, 2012. However, three of the four Canadian provinces participating in the initiative (British Columbia, Manitoba, and Ontario) have stated that they are not willing to join the WCI emissions trading program by the launch date: British Columbia indicated that it needs more time to re-evaluate the impact of the WCI on the province's competitiveness in the marketplace, while Ontario and Manitoba have stated that further study and public consultation is necessary before joining the cap-and-trade program. Quebec is also a WCI member province, and participating U.S. states include Arizona, California, Montana, New Mexico, Oregon, Utah, and Washington.

New EPA Concerns Over TransCanada's Keystone XL Pipeline

The U.S. Environmental Protection Agency ("EPA") has raised new concerns about TransCanada Corporation's proposed $7 billion Keystone XL pipeline that would bring 700,000 barrels per day of oil sands crude from Canada to refineries in Texas. The EPA has cited two small leaks on an existing Keystone line as cause for alarm, stating that potential leaks would impact groundwater and that the heavy oil it carries would raise health-damaging emissions at U.S. Gulf Coast oil refineries. The EPA has said that requiring ground-level inspections of valves and other parts of the pipeline several times a year, in addition to plane patrols of the pipeline, could improve the ability to detect leaks or spill and limit any damage. The U.S. State Department expects to decide whether the pipeline can go forward before the end of 2011.

U.S. Supreme Court Decision Rendered in *American Electric Power*

The U.S. Supreme Court has rejected the argument of various states and New York City in *American Electric Power Co. v. Connecticut*, thereby agreeing with the utility companies against whom the suit was launched that regulating GHG should be left to the U.S. EPA under U.S. clean air legislation.

As reported in ENVIROMATION, No. 66, dated December 2010 (see "U.S. Supreme Court Grants *Certiorari* in American Electric Power Case", p. 587), the case involved a group of states and New York City, and three environmental land trusts' suit against American Electric Power Co. Inc., Southern, Xcel Energy Inc., Duke Energy Corp., and Tennessee Valley Authority for common law nuisance in respect of their carbon dioxide emissions, and sought injunctive relief to compel the utilities to reduce their emissions. The utilities named in the case argued that the states lacked 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 asserted that common law tort actions are pre-empted by the EPA's regulations under the *Clean Air Act*.

The U.S. Supreme Court heard oral arguments on April 19, 2011. During the oral arguments, several justices questioned whether adequate standards are available for judges to adjudicate nuisance claims alleging global climate change, and Justice Ginsburg noted that the relief requested by the states would set a district judge up as "a kind of super EPA" – which ties in with the question as to whether the U.S. EPA's regulatory efforts have displaced the federal common law of public nuisance for GHG emissions – and stated that judges do not have the "resources or expertise" to make decisions about reducing GHG emissions. Justices Breyer and Scalia also questioned the implications of allowing a federal common law suit to continue, both in terms of the power of the judiciary to regulate GHG emissions, and the responsibleness of doing so in light of pending U.S. EPA regulation on this issue.

According to American Electric Power spokesman Pat Hemlepp, power companies that emit GHGs "can continue to operate in accordance with environmental regulations without worrying about the threat of incurring substantial costs defending against climate change litigation". In turn, David Doniger, policy director of the Climate Center at the Natural Resources Defense Council, stated that the ruling "reaffirms the Environmental Protection Agency's duty under the nation's 40-year-old *Clean Air Act* to safeguard public health and welfare from dangerous carbon pollution. Now the EOA just act without delay".

The Supreme Court's decision will impact two other common law public nuisance cases based on common law tort claims and alleging damage from climate change (*Comer v. Murphy Oil, USA*, 609 F.3d 1049 (5th Cir. 2010), and *Native Village of Kivalina v. ExxonMobil Corp.* 663 F.Supp.2d 863 (N.D. Cal. 2009).

Legislation Banning Shale Gas Drilling Passes in France's Lower House

A Bill that would ban shale gas drilling and revoke existing shale gas permits due to environmental concerns was approved by France's lower house on May 11th. Hydraulic fracturing (or "fracking") involves injecting water, sand, and chemicals into shale rock formations at high pressure to force out oil and natural gas, resulting in potential pollution from the large quantities of water and detergents used in the process. The Bill is currently being considered by France's Senate.

BUSINESS ENVIRONMENT

Airlines Flying to Europe Compelled To Join Emissions Trading Scheme

Commencing January 1, 2012, all airlines flying to Europe must be included in the Emissions Trading Scheme ("ETS"), which requires polluters to buy permits for each tonne of carbon dioxide emitted above a certain cap. The requirement has been the subject of opposition by global airlines and the International Air Transport Association, which is concerned that the measure would result in trade conflict and retaliatory measures.

However, European Union ("EU") Climate Commissioner Connie Hedegaard has countered that to back down now on legislation that has long been approved by all 27 EU governments, the European parliament, and the EU's Executive Commission would show weakness and encourage further challenges to EU policies. "If nations and regions do not defend their legitimate right to legislate and take appropriate non-discriminatory measures applicable to all economic operators, it would send an extremely unfortunate signal and create problems not just for the global climate, but also for European companies and businesses."

Report on Managing Climate Change Risk in Strategic Asset Allocation Released

To help institutional investors manage the potentially significant source of portfolio risk arising from uncertainty around climate policy, consulting company Mercer, in collaboration with institutional investors, industry groups, governments, and individuals, and with the support of the International Finance Corporation ("IFC") and Carbon Trust, has released its public report "Climate Change Scenarios – Implications for Strategic Asset Allocation". The report analyzes the extent of the impact of climate change on institutional investment portfolios and identifies a series of practical steps for institutional investors to consider, including allocation of climate-sensitive assets and the adoption of an "early warning" risk management process.

The report seeks to fill the gap in traditional approaches to modelling strategic asset allocation that fail to incorporate climate change risk due to heavy reliance on historical quantitative analysis, and uses scenario analysis to anticipate future trends and develop alternative pathways that might result from climate change. A "TIP Framework" models climate change risks by assessing three variables: (1) the rate of development and opportunities for investment into low carbon technologies; (2) the extent to which changes to the physical environment will affect investments; and (3) the implied cost of carbon and emissions levels resulting from global policy developments.

According to Rachel Kyte, Vice-President of the IFC, "This study makes a significant contribution to our ability to measure the level of risk that climate change creates for investment portfolios. Managing that risk in a way that maintains the returns expected by beneficiaries is a crucial responsibility for the management of these investment portfolios. This report provides some practical steps that investors can take today to shift their asset allocation to manage climate change risks and finance the much-needed infrastructure for a lower carbon future."

The report is available at http://www.mercer.com/articles/1406410.

CCH a Wolters Kluwer business

CCH Canadian Limited
300-90 Sheppard Avenue East
Toronto ON M2N 6X1
416 224 2248 • 1 800 268 4522 tel
416 224 2243 • 1 800 461 4131 fax
www.cch.ca