

Alberta makes significant progress in establishing a legal and regulatory regime to accommodate carbon capture and storage (CCS) projects

By Nigel Bankes

Legislation commented on:

Bill 24, [Carbon Capture and Storage Statutes Amendment Act, 2010](#), The Legislative Assembly of Alberta, [Third Session](#), 27th Legislature, 59 Elizabeth II

On November 1, 2010 the Minister of Energy introduced in the legislature Bill 24, the *Carbon Capture and Storage Statutes Amendment Act*. If and when enacted, the Bill will amend four of the provinces's energy statutes, the *Energy Resources Conservation Act (ERCA)*, RSA 2000, c.E-10, the *Mines and Minerals Act (MMA)*, RSA 2000, c. M-17, the *Oil and Gas Conservation Act (OGCA)*, RSA 2000, c.O-6 and the *Surface Rights Act (SRA)*, RSA 2000, c.S-24, all in a bid to accommodate CCS projects and provide clear legal and regulatory rules for such projects. This blog focuses on the amendments to the *MMA* and the *OGCA*.

The *MMMA* amendments

There is a lot of detail here (and some of that detail is crucially important in assessing the overall effect of the legislation) but the most important amendments are four-fold: (1) a new declaratory provision vesting pore space in the Crown in right of the province, (2) the creation of a disposition regime for Crown owned pore space for sequestration purposes (defined as permanent disposal), (3) the creation of a mechanism for transferring long term liability from the operator to the Crown, and (4) the creation of a Fund, supported by contributions from the industry, to cover certain pre- and post-closure costs including costs associated with CCS orphan facilities.

The Crown vesting provision

This is the bravest provision in the Bill and it shows that the government has finally grasped the CCS nettle. The new s.15.1 of the *MMA* is written in declaratory terms indicating that it is intended to apply retroactively as well as prospectively. The main clause has three parts. The first paragraph (framed in negative terms) declares that no grant of lands and mines and minerals from the Crown has ever operated as a conveyance of title to pore space below the surface of the land. The second paragraph complements the first by declaring in positive terms that pore space is vested in the Crown in right of the province, and the third paragraph ties this all back into the *Land Titles Act*, RSA 2000, c. L-4 by providing that the exception (the first paragraph) is deemed to be an exception contained in the original grant from the Crown and is therefore effectively endorsed on every certificate of title in the province without the need for any special mention (i.e. it is an overriding provision). The declaratory provisions are accompanied by equally far reaching clauses deeming the statements as to ownership of pore space not to be an expropriation

and not to give rise to any cause of action or the basis for a declaratory judgement. The Bill also provides ancillary rights to work by means of an amended s.58.

The disposition scheme

The starting point for the disposition scheme is the new s.15.1(3) which provides that the Minister may enter into “agreements” for the use of pore space. A new Part 9 of the *MMA* builds on this by describing two new forms of agreement: (1) an agreement that gives the holder the right to drill evaluation wells, (new s.115) and (2) an agreement that gives the holder the right to inject captured carbon dioxide into a subsurface reservoir for sequestration (new s.116). Unlike other agreements issued under the *MMA* (see the current Part 6) these agreements will not be freely transferable; all proposed transfers will require the consent of the Minister. The legislation does not address any linkage between these two forms of tenure – for example does the holder of the evaluation tenure have the right or the preferential right to obtain an injection tenure?

The transfer of liability

Many have argued that the long (geological) time periods associated with CCS require that the government assume the long term liabilities associated with CCS operations post closure. Not all governments have accepted this argument although most have. In this case Alberta has joined the larger group. Two questions are important: (1) when does the Crown assume these liabilities; and (2) what liabilities does the Crown assume?

The Crown assumes the liabilities described in the *Act* when the Minister issues a closure certificate (CC) to a lessee in respect of a Part 9 agreement. A lessee of an agreement may apply for a CC where the Minister is satisfied (new s.120) that the lessee has met a number of conditions including abandonment and reclamation obligations under the *OGCA* and the *Environmental Protection and Enhancement Act (EPEA)*, RSA 2000, c. E-12, the closure period specified in the regulations has passed, and “the captured carbon dioxide is behaving in a stable and predictable manner, with no significant risk of future leakage.”

On issuing the CC, the Crown (new s.121) assumes the obligations of the lessee: (1) as owner and licensee under the *OGCA*, (2) as a “person responsible” for the purposes of the release provisions of *EPEA*, (3) as the “operator” for the purposes of the reclamation provisions of *EPEA*, and (4) (more generically) under the *SRA*. The Crown also becomes the owner of the captured and injected carbon dioxide (with whatever liabilities that might be associated with that status) and the Crown indemnifies the lessee against its liabilities in relation to any action in tort brought by a third party if “the liability is attributable to an act done or omitted to be done by the lessee in the lessee’s exercise of rights under the agreement in relation to the injection of captured carbon dioxide”. Thus the Crown undertakings include both an assumption of statutory liabilities and a third party indemnity arrangement. Both obligations are triggered automatically when the Minister issues a CC. This is not simply a duty on the part of the Minister to negotiate the terms of an indemnity arrangement.

These are clearly broad assumptions of liability and indemnity arrangements but the question for industry will be whether they describe the universe of possible claims that might be made against the participants in a CCS project. In this context it is perhaps important to note that the assumption of liability and indemnity arrangements are all limited to the lessee of the agreement (defined in the Act as the holder according to the records of the Department of an agreement). Furthermore, the assumption of liability does not cover any emissions liability that the operator

of a CCS facility might have under climate change legislation. The answer to this latter may simply be that since there is no liability under current legislative arrangements (see the *Specified Gas Emitter Regulations*, Alta. Reg 139\2007) there is no need to address this in the current Bill.

How will government fund these arrangements? The Bill establishes a Post-closure Stewardship Fund (new s.122). Holders of injection rights are required to pay fees into the fund over the course of injection (s.116(3)(g) & s.124(i)). Monies paid into the Fund can be used for monitoring the injected plume and for the assumption of statutory liabilities by the Crown under the legislation discussed above (*OGCA*, *EPEA* and the *SRA*) and to cover the costs associated with proper management of CCS orphan facilities (these must be facilities where the lessee of the agreement has become defunct *before* the Minister issues a CC; after the CC has been issued there can be no orphan since the Crown has assumed the obligations). In order to fully deal with CCS orphan facilities the Bill creates a set of provisions that broadly parallel the current orphan well provisions of Part 11 of the *OGCA*. Monies in the Fund *cannot* be used to cover the indemnity side of the government's obligations; this seems to be strictly for the account of the consolidated revenue fund.

The Fund will not serve to cap the province's liability under the terms of the assumption of liability and indemnity arrangements, but it will serve to ensure that the injection industry covers at least some of the costs of any necessary activities.

The *OGCA* Amendments

For the most part the amendments to the *OGCA* simply serve to build on the existing *OGCA* provisions in relation to scheme approvals for injection operations (s.39(1)(d)) and complement the proposals that are embedded in the amendments to the *MMA* discussed above. A critical amendment to give effect to the Crown's assumption of statutory obligations is a proposed new provision of the *OGCA* (s.23.1) which will require the Board to amend its well licence records to list the Crown as the licensee of record once the Minister has issued a CC thereby relieving the CCS operator of what would otherwise be a continuing liability for abandonment operations (see my post [A century of liability for an abandoned well](#)). Another amendment serves to remove CCS injection wells from the current coverage that they would have under the general Orphan Fund.

Assessment

A first step

This Bill has been a long time in coming. Commentators (including this blogger, see Bankes, Poschwatta and Shier, “The Legal Framework for Carbon Capture and Storage in Alberta” (2008), 44 Alberta Law Review 585) and task forces (e.g the [EcoEnergy Task Force](#) and the [Alberta Carbon Capture and Storage Development Council](#)) have argued the need for clear provincial legislative action to accommodate CCS for a number of years, and so progress is to be welcomed. But does this go far enough, or is it just a first step (thereby perhaps creating uncertainty as to when and if the next step will be taken)?

In some areas the legislation takes us all the way. This is true, for example, of the Crown vesting provision. There is nothing wishy-washy or tentative about this and, at a stroke, the declaratory provisions in this legislation should resolve the concerns that some have expressed about potential holdout and liability issues associated with migration of the plume of injected carbon dioxide (see Bankes, [Legal Issues Associated with the Adoption of Commercial Scale CCS Projects](#), a paper prepared for Carbon Capture and Storage Forum, A Pembina-ISEEE Thought Leaders Forum, November 10, 2008, Calgary, and my [Star Weald](#) blog). But in other areas much work remains to be done. One can get some assessment of this by looking at the heads of the regulation-making powers listed in the new s.124 of the *MMA* which confirms that on the regulatory side of things the legislation gives us a framework but leaves the details to be filled in over the coming months and perhaps years. These broad regulation making powers include rules for such crucial matters as risk assessments to be conducted by applicants for agreements, closure plans, monitoring, measurement and verification (MMV) plans, and remedial action plans as well as rules such as minimum work obligations which pertain more directly to the injection rights themselves.

The ERCB or the Department of Energy

The regulatory focus of some of these regulation-making powers does raise a question as to the appropriate allocation of regulatory responsibilities as between the Energy Resources Conservation Board (ERCB) on the one hand and the Minister and the Department of Energy (DOE) on the other hand. The oil and gas industry in the province has long come to accept and expect a distinctive separation of powers between the province as owner of most of the oil and gas rights in the province and the ERCB as the arms length regulator. The province as owner acts through the Department of Energy (DOE) and the *MMA* and issues agreements (oil and gas leases and licences), sets royalty terms and collects those royalty payments. The Board regulates to ensure proper conservation of the resource, safety and the other values referred to in the purposes sections of the *OGCA* and *ERCA*. Sometimes the distinction is blurred as in the gas over bitumen saga (*Giant Grosmont Petroleums Ltd. v. Gulf Canada Resources Ltd.*, 2001 ABCA 174) but most of the time DOE sets the policy and the ERCB carries out the technical regulation. But in this case it seems to me that the Department is setting itself up as another regulator in the context of issuing the closure certificate for a CCS project and I am not sure that this makes sense.

But perhaps the more important question is why? The government must have known what it was doing. Does it not trust the Board? Does it view these decisions as more political than technical? Will industry react favourably to this redistribution of powers or will it be concerned that the decision making on closure certificates has become more political and less science-based and

objective. And what about the public? Public faith in the ERCB has been on the wane for some time, but is not clear to me that the public will feel better protected by a Minister making closure certificate decisions than the current situation in which those decisions would be made by the Board. Several months ago I commented on the Board's first foray into CCS rule making (see my post [Mutatis Mutandis](#)). At that time I bewailed the absence of background material that was being provided in support of the rule making but also the apparent lack of coordination between the ERCB and the DOE. The current proposals seem to carve out a leadership role for the DOE but they do not give me a sense of a significantly greater degree of coordination between the two entities.

As discussed above, the new Fund will have a variety of responsibilities. It may be used for orphan purposes but it may also be used for ongoing MMV purposes and for assumption of statutory liabilities. I question though whether it was necessary to bring the orphan responsibilities within the new Fund rather than leaving them with the existing Orphan Fund. At the present time, injection facilities associated with acid gas disposal operations for example fall within the Orphan Fund. It is not clear to me that the orphan related responsibilities for pre-closure certificate CCS operations are any different (and in particular is there any evidence that they are likely to be any more demanding or expensive?) than the similar responsibilities associated with conventional oil and gas producing operations or other injection operations. The trend in relation to orphan matters generally favours a pooling approach (see the recent amendments to the Orphan Fund arrangements to include oilfield waste facilities (OWL)) to wells and facilities rather than an approach that divides the industry into different segments. I can see the argument in favour of a special fund for those things that are really distinctive about CCS operations (long term MMV, and long term post-closure liabilities) but these all relate to the post closure certificate phase rather than the situation of a party becoming an orphan *before* the Minister grants the closure certificate.

Perhaps two final comments on what might be missing from this package. First, I don't see much here about the environment and about the protection of potable groundwater. This is the legislative hook for federal rule making in the United States on the subject of geological sequestration (see the Environmental Protection Agency's (EPA's) [Proposed Rules on CCS](#)) and while we don't have that singular focus for our legislative approach it is clearly an issue that the public will expect government to address. Government and the Board may well have plans to address it but I don't see them here. What I see instead is a new provision in the *OGCA* (the new s.39(1.1)) which is designed to protect existing and future production opportunities and gas storage interests. There is nothing here that gives the same standing to the protection of potable groundwater sources. Second, and no doubt much more trivial, there is nothing here to deal with problems of third party access i.e. the question of how a party which needs access to CCS storage or related infrastructure facilities in order to meet its regulatory obligations will be able to obtain access if it cannot do so on market terms. Several options exist to deal with this issue including the possibility of a new "common order" under the *OGCA* but, as I say, there is nothing here to suggest that government thinks that this might be an issue that needs to be addressed, at least at this early stage in the development of the CCS industry in the province.

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