

## RECENT LEGISLATIVE AND REGULATORY DEVELOPMENTS OF INTEREST TO ENERGY LAWYERS

JESSICA MERCIER, NICOLE BAKKER, AND ELYSE BOUEY\*

*This article provides a high-level overview of regulatory and legislative developments between April 2023 and early May 2024 which may be of interest to Canadian energy lawyers. It includes discussions of recent regulatory decisions and changes to regulatory and legislative regimes impacting energy law, and highlights several ongoing regulatory and legislative developments to watch in the coming year. Topics of note include anticipated legislation and policy changes relating to federal climate change initiatives and sector-specific developments related to carbon capture, utilization and storage, electricity generation and transmission, mineral resource development, oil and gas, and pipelines. This article also comments on developments relevant to Indigenous Law and environmental law.*

### TABLE OF CONTENTS

I.	INTRODUCTION.....	574
II.	CLIMATE CHANGE AND DECARBONIZATION .....	574
	A. 2023 PROGRESS REPORT ON FEDERAL 2030 EMISSIONS REDUCTION PLAN.....	575
	B. FEDERAL FRAMEWORK FOR OIL AND GAS SECTOR EMISSIONS CAP.....	575
	C. PROPOSED AMENDMENTS TO FEDERAL METHANE REGULATIONS.....	576
	D. FEDERAL <i>CLEAN FUEL REGULATIONS</i> .....	577
	E. FEDERAL <i>CLEAN ELECTRICITY REGULATIONS</i> .....	577
	F. PROVINCIAL RESPONSES TO FEDERAL DECARBONIZATION INITIATIVES .....	578
	G. CARBON CAPTURE, UTILIZATION AND STORAGE .....	579
III.	POWER .....	580
	A. RENEWABLES .....	580
	B. NUCLEAR .....	581
	C. ENERGY STORAGE .....	583
	D. ELECTRICITY MARKET DESIGN .....	583
	E. TRANSMISSION .....	583
	F. INTERTIES.....	584
	G. DISTRIBUTION .....	586
IV.	CRITICAL MINERALS .....	586
	A. FEDERAL FUNDING.....	586
	B. ALBERTA <i>MINERAL RESOURCES DEVELOPMENT ACT</i> .....	587

\* Jessica Mercier is legal counsel with Imperial Oil Limited. Nicole Bakker and Elyse Bouey are environmental and regulatory lawyers at Blake, Cassels & Graydon LLP. The authors gratefully acknowledge the significant contributions of Jordan Prestie, Oga Obeya, and Simran Joura who were students-at-law with Blake, Cassels & Graydon LLP when this article was authored.



C.	SASKATCHEWAN HELIUM AND BRINE MINERAL TENURE .....	587
V.	OIL AND GAS .....	587
A.	BRITISH COLUMBIA LIABILITY MANAGEMENT FRAMEWORK UPDATES.....	588
B.	ALBERTA LIABILITY MANAGEMENT FRAMEWORK UPDATES .....	588
C.	ALPHABOW ENERGY LTD. REGULATORY APPEALS .....	590
VI.	PIPELINES .....	593
A.	TRANS MOUNTAIN PIPELINE EXPANSION INTERIM TOLL .....	593
B.	UPDATED ALBERTA <i>PIPELINE RULES</i> .....	594
C.	PIPELINES AND THE ENERGY TRANSITION .....	594
VII.	INDIGENOUS LAW .....	595
A.	<i>UNDRIP ACTION PLAN</i> .....	595
B.	NEBC CONNECTOR PROJECT .....	595
C.	CUMULATIVE EFFECTS MANAGEMENT AT THE BCER .....	596
VIII.	ENVIRONMENTAL LAW .....	597
A.	THE <i>REFERENCE RE IMPACT ASSESSMENT ACT</i> DECISION AND PROPOSED AMENDMENTS.....	597
B.	UPDATES TO THE <i>CANADIAN ENVIRONMENTAL PROTECTION ACT</i> .....	599
C.	AEPA LAYS CHARGES UNDER THE <i>EMISSIONS MANAGEMENT AND CLIMATE RESILIENCE ACT</i> .....	600
IX.	CONCLUSION .....	601

## I. INTRODUCTION

The past year saw a continued evolution of the Canadian legislative and regulatory landscape pertaining to the practice of energy law. This article provides a high-level overview of regulatory and legislative developments within that landscape, primarily between April 2023 and early May 2024. Topics include legislative and policy changes relating to federal climate change initiatives and sector-specific developments relating to electricity generation and transmission, mineral resource development, oil and gas, and pipelines. This article also comments on developments relevant to Indigenous Law and environmental law.

## II. CLIMATE CHANGE AND DECARBONIZATION

This year has been marked by a significant difference of opinion between federal and provincial governments over the pace and scale of decarbonization efforts amid mounting concerns over energy security and affordability. In response to increasingly stringent federal climate policies, some provinces have continued to publicly voice their concerns regarding disproportionate regional impacts, while others have gone to greater lengths by directly challenging federal initiatives through competing policies or legal action.<sup>1</sup> Despite

---

<sup>1</sup> See e.g. *Alberta Sovereignty within a United Canada Act*, SA 2022, c A-33.8 [*Sovereignty Act*]; *The Saskatchewan First Act*, SS 2023, c 9 [*Saskatchewan First Act*]; Government of Alberta, News Release, “Accountability for Ottawa’s Carbon Tax Double Standard” (29 October 2024), online: [perma.cc/2H4L-6S7X].

this turmoil, both levels of government are continuing to encourage investment and innovation in clean technology and decarbonization initiatives including carbon capture, utilization, and storage (CCUS), renewable power generation, and nuclear power generation.<sup>2</sup>

#### **A. 2023 PROGRESS REPORT ON FEDERAL 2030 EMISSIONS REDUCTION PLAN**

On 7 December 2023, the Government of Canada released the *2023 Progress Report on the 2030 Emissions Reduction Plan*.<sup>3</sup> This is the first of three progress reports required under the *Canadian Net-Zero Emissions Accountability Act*,<sup>4</sup> with subsequent reports anticipated in 2025 and 2027. The report assesses progress toward federal greenhouse gas (GHG) emissions reduction targets established under the *2030 Emissions Reduction Plan*.<sup>5</sup> The *2030 ERP*, released in 2022, identified Canada's target of reaching 40 percent below 2005 national GHG emissions levels by 2030, and its interim target of 20 percent below 2005 levels by 2026.<sup>6</sup> The 2023 progress report explains that, based on current emissions trends and projections, Canada is poised to achieve emission reductions that outperform these 2026 and 2030 targets.<sup>7</sup> In a news release accompanying the progress report, Environment and Climate Change Canada (ECCC) highlighted the importance of anticipated regulatory developments to Canada's success in reaching long-term climate targets, including the implementation of an oil and gas emissions cap and methane reduction requirements (discussed below), as well as the federal Green Buildings Strategy and "plans for the marine, rail, and aviation sectors."<sup>8</sup>

#### **B. FEDERAL FRAMEWORK FOR OIL AND GAS SECTOR EMISSIONS CAP**

On 7 December 2023, the Government of Canada introduced its draft of the *Regulatory Framework for an Oil and Gas Sector Greenhouse Gas Emissions Cap* pursuant to which oil and gas sector emissions would be capped at 106 to 112 megatons per year by 2030.<sup>9</sup> This equates to emissions that are 20 to 23 percent below 2019 levels with the use of offsets, or 35 to 38 percent below 2019 levels without the use of offsets.<sup>10</sup> Covered facilities would

---

<sup>2</sup> See e.g. Natural Resources Canada, "Government of Canada Supports 12 Clean Energy Projects in Alberta with Over \$175 Million in Federal Investments," online: [perma.cc/DV2Q-PY9X]; Governments of Ontario, New Brunswick, Alberta, and Saskatchewan, *A Strategic Plan for the Deployment of Small Modular Reactors* (March 2022), online: [perma.cc/DQ25-CKQW]; Government of Alberta, News Release, "Accelerating Emissions Reductions" (28 November 2023), online: [perma.cc/CG7D-EGYM].

<sup>3</sup> Environment and Climate Change Canada, *2023 Progress Report on the 2030 Emissions Reduction Plan* (Gatineau: ECCC, 2023) [ECCC, 2023 ERP].

<sup>4</sup> SC 2021, c 22.

<sup>5</sup> Environment and Climate Change Canada, *2030 Emissions Reduction Plan: Canada's Next Steps for Clean Air and a Strong Economy* (Gatineau: ECCC, 2022) [ECCC, 2030 ERP].

<sup>6</sup> *Ibid* at 6, 82.

<sup>7</sup> ECCC, 2023 ERP, *supra* note 3 at iii.

<sup>8</sup> Environment and Climate Change Canada, News Release, "First Progress Report on the 2030 Emissions Reduction Plan Shows Canada Bending the Curve on Greenhouse Gas Emissions" (7 December 2023), online: [perma.cc/G2LA-96ZY].

<sup>9</sup> Environment and Climate Change Canada, *A Regulatory Framework to Cap Oil and Gas Sector Greenhouse Gas Emissions* (Gatineau: ECCC, 2023) at 5.

<sup>10</sup> *Ibid* at 4–5.

need to be registered under the cap-and-trade system and hold emission allowances or credits to emit GHGs, with compliance periods of three years allowing for the banking of credits and planning windows for emissions reduction initiatives.<sup>11</sup> The framework proposes that initial emission allowances would be provided at no cost, but allocations would decrease over time, requiring facilities to cut emissions or participate in decarbonization efforts.<sup>12</sup> The national emissions cap is a key commitment in the *2030 ERP* and has been designed to take other targets into account,<sup>13</sup> such as Canada's enhanced methane reduction strategy, as well as climate policies at the federal and provincial levels. While the Government of Canada first confirmed its plans to impose an emissions cap on the oil and gas sector at the twenty-sixth United Nations Climate Change Conference held in 2021,<sup>14</sup> the development and release of draft regulations has been slowed in part due to the Supreme Court of Canada ruling in *Reference re Impact Assessment Act*<sup>15</sup> and the Federal Court ruling in *Canada (AG) v. Responsible Plastic Use Coalition*<sup>16</sup> commenting on the boundaries of federal and provincial jurisdiction over matters of the environment. Draft regulations to establish the emissions cap under the *Canadian Environmental Protection Act, 1999*<sup>17</sup> are anticipated in mid-2024, with implementation slated for 2025.<sup>18</sup>

### C. PROPOSED AMENDMENTS TO FEDERAL METHANE REGULATIONS

On 16 December 2023, the federal government released proposed amendments to the Regulations Respecting Reduction in the Release of Methane and Certain Volatile Organic Compounds (Upstream Oil and Gas Sector)<sup>19</sup> to facilitate Canada's commitment to "a 75% reduction in oil and gas sector methane emissions [below 2012 levels] by 2030" through regulatory and performance-based approaches.<sup>20</sup> The proposed amendments build upon existing federal methane reduction regulations that came into force under *CEPA* in 2018 with a target of reducing methane emissions from the oil and gas sector by "40–45 percent below 2012 levels by 2025."<sup>21</sup> In addition to enhanced reduction targets, "[t]he proposed Amendments also introduce an annual [third party] inspection requirement and include a performance-based option as an alternative pathway for compliance."<sup>22</sup> While the amendments are viewed as being complimentary to the proposed oil and gas sector emissions cap, the federal government opted to maintain a more prescriptive regulatory

<sup>11</sup> *Ibid* at 3–4, 7.

<sup>12</sup> *Ibid* at 4.

<sup>13</sup> ECCC, *2030 ERP*, *supra* note 5 at 50.

<sup>14</sup> Prime Minister of Canada Justin Trudeau, News Release, "Prime Minister Trudeau Announces Enhanced and Ambitious Climate Action to Cut Pollution at the COP26 Summit" (1 November 2021), online: [perma.cc/3C6X-ELVX].

<sup>15</sup> 2023 SCC 23 [*IAA Reference*].

<sup>16</sup> 2024 FCA 18.

<sup>17</sup> SC 1999, c 33 [*CEPA*].

<sup>18</sup> Environment and Climate Change Canada, *2030 ERP*, *supra* note 5 at 9.

<sup>19</sup> SOR/2018-66.

<sup>20</sup> *Regulations Amending the Regulations Respecting Reduction in the Release of Methane and Certain Volatile Organic Compounds (Upstream Oil and Gas Sector)*, (2023) C Gaz I, 3968, online: [perma.cc/7M6W-FSLH] [*Methane Regulations Amendment*].

<sup>21</sup> *Ibid*.

<sup>22</sup> *Ibid* at 3980. See also *ibid* at 4026, 4035–36 (sections 8.13, 53.2). The performance-based approach proposed under the *Methane Regulations Amendment* "relies on the installation of continuous monitoring systems for ... potential methane emission sources," which trigger a mitigation response upon detection of methane emissions (*ibid* at 3974).

approach, prescribing methane emission standards for specific equipment and sites.<sup>23</sup> The proposed amendments would begin to take effect in 2027 for emission inspection programs and investments in new production, with full sector compliance required by 2030.<sup>24</sup> This phased implementation approach is intended to distribute compliance costs over multiple years and “allow late life-cycle production sites to avoid new capital investments.”<sup>25</sup>

#### D. FEDERAL CLEAN FUEL REGULATIONS

While certain aspects of the *Clean Fuel Regulations* have been in force since June 2022, the obligation for producers and importers of gasoline and diesel to achieve prescribed carbon intensity reduction requirements did not come into force until 1 July 2023.<sup>26</sup> The first compliance period under the *CFR* ran from July 2023 to December 2023 with applicable carbon intensity limits of 91.5 grams of carbon dioxide equivalent per megajoule of energy for gasoline and 89.5 grams of carbon dioxide equivalent per megajoule of energy for diesel.<sup>27</sup> Regulated parties that may owe compliance credits for this period had until July 2024 to register their credits via the Credit and Tracking System, which is the same system currently used by participants in the federal Output-Based Pricing System and GHG Offset Credit System.<sup>28</sup> During a technical briefing on 30 June 2023, officials from ECCC stated that Canada has already seen significant investments in renewable fuels production because of policies like the *CFR* and noted that electric vehicle charging companies operating in Canada have already been generating credits under the *CFR* regime.<sup>29</sup> “The *Clean Fuel Regulations* were modelled [in part] on existing [and proposed] low-carbon fuel regulations [and standards] in other jurisdictions,”<sup>30</sup> such as the Low Carbon Fuel Standard in British Columbia.<sup>31</sup>

#### E. FEDERAL CLEAN ELECTRICITY REGULATIONS

Canada unveiled draft *Clean Electricity Regulations*<sup>32</sup> on 10 August 2023, setting forth stringent average annual emissions intensity performance standards aimed at transitioning toward net-zero GHG emissions from the electricity sector. The regulations would impose emissions intensity standards on electricity generated from fossil fuels, such as natural gas units, with a limit of 30 tonnes of carbon dioxide equivalent per gigawatt hour starting in 2035 (the Performance Standard).<sup>33</sup> After receiving public comments on the draft regulations, ECCC issued a comprehensive “What We Heard” Report on 16 February

<sup>23</sup> *Methane Regulations Amendment*, *ibid* at 3972–74.

<sup>24</sup> *Ibid* at 3973.

<sup>25</sup> *Ibid* at 3976–77.

<sup>26</sup> *Clean Fuel Regulations*, SOR/2022-140, ss 5(1), 5(4) [*CFR*].

<sup>27</sup> *Ibid*, s 5(1).

<sup>28</sup> Government of Canada, “Canada’s Greenhouse Gas Offset Credit System: Credit and Tracking System (CATS) and Public Registry,” online: [perma.cc/5BYN-V25K].

<sup>29</sup> Environment and Climate Change Canada, Statement, “Clean Fuel Regulations: Recap of June 2023 Media Technical Briefing” (30 June 2023), online: [perma.cc/83HJ-ATG9].

<sup>30</sup> *Ibid*.

<sup>31</sup> The British Columbia Low Carbon Fuel Standard (LCFS) has been in place since 2010. Effective 1 January 2024, the *Low Carbon Fuels Act*, SBC 2022, c 21 and associated regulations replaced the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, SBC 2008, c 16 as the legislative basis for the LCFS. Amendments to the LCFS include new requirements for aviation fuel and fuel used for ground support and cargo handling equipment (in addition to transportation).

<sup>32</sup> (2023) C Gaz I, 2709, online: [perma.cc/HZJ2-4DCX].

<sup>33</sup> *Ibid*.

2024,<sup>34</sup> summarizing the feedback received and outlining the potential for significant amendments. Some of the potential amendments outlined in the report include: (1) unit-specific emissions limits tailored to each unit's capacity; (2) adjusting the Performance Standard to allow utilities to retrofit existing gas plants with carbon capture and storage technology; (3) permitting the owners of multiple units, as well as separate owners with units in the same jurisdiction, to pool emissions from those units; (4) permitting the limited use of offsets for compliance purposes; (5) extending the proposed 20 year end-of-prescribed-life period to minimize stranded assets; (6) delaying application of the Performance Standard to new units with substantial investment and work underway; (7) providing time-limited allowances for emissions from existing cogeneration units; (8) adjusting minimum size thresholds to electricity generation capacity of 25 megawatts (MW) at the collective facility level (rather than single units); and (9) allowing provincial grid operators to declare emergencies to temporarily suspend emissions standards with Ministerial notice or consent from ECCC.<sup>35</sup> Comments on these proposed changes closed on 15 March 2024, with the final version of the *Clean Electricity Regulations* expected to be released at some point in 2024.<sup>36</sup>

## F. PROVINCIAL RESPONSES TO FEDERAL DECARBONIZATION INITIATIVES

In response to energy affordability concerns raised by provincial stakeholders, Prime Minister Trudeau announced in the fall of 2023 that the federal government would move ahead with doubling rural carbon tax rebates through the Climate Action Incentive Payment and provide a three year pause on the federal fuel charge for deliveries of heating oil in jurisdictions subject to the federal fuel charge, along with other incentives for the adoption of electric heat pumps in Atlantic Canada.<sup>37</sup> The heating oil exemption came under scrutiny from government officials in Alberta and Saskatchewan, where natural gas is a main source of home heating, and having regard to energy affordability concerns voiced publicly by these provinces in relation to current and proposed measures under the *Greenhouse Gas Pollution Pricing Act*<sup>38</sup> and *Clean Electricity Regulations*.<sup>39</sup> Prior to the Prime Minister's announcement, both provinces had enacted provincial sovereignty legislation aimed at combatting federal decarbonization initiatives impacting the oil, gas, and electricity sectors. This includes the *Alberta Sovereignty within a United Canada Act*,<sup>40</sup> in force since 15 December 2022, and *The Saskatchewan First Act*,<sup>41</sup> which was assented to on 6 April 2023.

Both the *Sovereignty Act* and the *Saskatchewan First Act* were invoked for the first time in November 2023 in response to the draft *Clean Electricity Regulations*. Following a

---

<sup>34</sup> Environment and Climate Change Canada, *Clean Electricity Regulations Public Update: 'What We Heard' During Consultations and Directions Being Considered for the Final Regulations* (Gatineau: ECCC, 2024).

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.* at 9.

<sup>37</sup> Department of Finance Canada, News Release, "Lowering Energy Bills for Canadians Across the Country" (3 November 2023), online: [perma.cc/SHZ4-W2HT].

<sup>38</sup> SC 2018, c 12, s 186 [GGPPA].

<sup>39</sup> *Supra* note 32.

<sup>40</sup> *Sovereignty Act*, *supra* note 1.

<sup>41</sup> *Saskatchewan First Act*, *supra* note 1.

technical submission prepared by the Government of Alberta concerning the draft regulations,<sup>42</sup> Premier Danielle Smith introduced a motion in Alberta's legislative assembly on 28 November 2023 for approval of a resolution under the *Sovereignty Act* that would, among other things: (1) require all provincial entities to not recognize the constitutional validity of, enforce, or cooperate in the implementation of, the proposed regulation; and (2) explore the potential establishment of a provincial Crown corporation to achieve provincial electricity system objectives.<sup>43</sup> On the same day, Saskatchewan announced that the draft *Clean Electricity Regulations* would be referred to the Economic Impact Assessment Tribunal created under the *The Saskatchewan First Act*, and forecasted that future referrals for assessment of federal regulations relating to the oil and gas emissions cap and *CFR* could also be anticipated.<sup>44</sup> On 6 December 2023, Saskatchewan passed *The SaskEnergy (Carbon Tax Fairness for Families) Amendment Act, 2023*<sup>45</sup> which amends *The SaskEnergy Act*<sup>46</sup> to designate the provincial Crown as the sole registered distributor of natural gas in Saskatchewan and assigns exclusive ministerial responsibility for matters relating to payments under the *GGPPA*. This new legislation aims to provide Crown indemnification to SaskEnergy and all associated representatives in relation to any matter involving the *GGPPA*, including the removal of federal carbon tax payments from SaskEnergy bills beginning on 1 January 2024.<sup>47</sup>

While provincial governments in Manitoba, Ontario, Nova Scotia, and New Brunswick have also called on the federal government to revisit the approach to carbon pricing, the provincial legislative response has to date been limited to Alberta and Saskatchewan.<sup>48</sup>

## G. CARBON CAPTURE, UTILIZATION, AND STORAGE

On 28 November 2023, the Alberta government announced the Alberta Carbon Capture Incentive Program, a new grant offered by the provincial government to incentivize CCUS projects located within the province.<sup>49</sup> The announcement was followed by the introduction of federal legislation setting out the previously announced investment tax credit for CCUS projects.<sup>50</sup> The Alberta Carbon Capture Incentive Program provides a 12 percent grant that can be coupled with the federal investment tax credit to support new CCUS projects in the province of Alberta.<sup>51</sup> The Government of Alberta has suggested that these incentives will

---

<sup>42</sup> Alberta Environment and Protected Areas, *Federal Draft Clean Electricity Regulations: Government of Alberta Technical Submission* (Edmonton: AEP, 2023), online: [perma.cc/CY3U-77JR].

<sup>43</sup> Alberta, Legislative Assembly, *Alberta Hansard*, 31-1 (28 November 2023) at 389.

<sup>44</sup> Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)*, 29-4, vol 65, No 19A (28 November 2023) at 4821.

<sup>45</sup> SS 2023, c 50.

<sup>46</sup> SS 1992, c S-35.1.

<sup>47</sup> Government of Saskatchewan, News Release, "Government Introduces Carbon Tax Fairness for Families Act" (16 November 2023), online: [perma.cc/998Z-BEAA].

<sup>48</sup> *Sovereignty Act*, *supra* note 1; *Saskatchewan First Act*, *supra* note 1.

<sup>49</sup> Government of Alberta, News Release, "Accelerating Emissions Reductions" (28 November 2023), online: [perma.cc/K4C7-BU2X] [Government of Alberta, "Accelerating"].

<sup>50</sup> Bill C-59, *An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023 and certain provisions of the budget tabled in Parliament on March 28, 2023*, 1st Sess, 44th Parl, 2023 (first reading 21 November 2023).

<sup>51</sup> Government of Alberta, "Accelerating," *supra* note 49.



collectively provide CCUS proponents with a competitive advantage in developing CCUS technology and bringing Alberta-based CCUS projects to completion.<sup>52</sup>

One such project is the Pathways Alliance CO<sub>2</sub> Transportation Network and Storage Hub. On 22 March 2024, Canadian Natural Resources Limited began filing applications with the Alberta Energy Regulator (AER) on behalf of Pathways Alliance for the 400-kilometre CO<sub>2</sub> pipeline that will transport captured carbon dioxide from oil sands facilities to a proposed storage hub near Cold Lake, Alberta.<sup>53</sup> The pipeline application is the first major regulatory step to progressing the \$16.5 billion CCUS project, and applications for the storage hub component are anticipated to be filed later in 2024.<sup>54</sup> Both sets of applications will be watched closely by energy lawyers across the country.

### III. POWER

There have been several notable developments impacting the power industry in Canada this year, particularly in Alberta where government officials have forecasted changes to regulations impacting renewable power generation, transmission system planning, and electricity market design in the aftermath of a provincial pause on renewable power plant approvals. Across the nation, there has been an increasing focus on the role of interprovincial and international interties, electricity system optimization, energy storage, and other emerging technologies to ensure adequate and stable electricity supply into the future.

#### A. RENEWABLES

On 3 August 2023, the Alberta government enacted the *Generation Approvals Pause Regulation*,<sup>55</sup> prohibiting the Alberta Utilities Commission (AUC) from approving new renewable electricity generation projects until 29 February 2024. On the same day, by Order in Council 171/2023, the province directed the AUC to conduct an inquiry regarding policies and procedures for the development of renewable electricity generation, including: (1) the use of agricultural and public land; (2) reclamation obligations and security; (3) impacts to viewsapes; (4) the role of municipal governments in regulating development; and (5) the impact on generation supply mix and electricity system reliability.<sup>56</sup> The AUC considered the majority of these policy issues in a “Module A” proceeding,<sup>57</sup> with the supply and reliability issues addressed in a separate “Module B” proceeding.<sup>58</sup> Following receipt of the AUC’s report on Module A, Alberta’s Minister of Affordability and Utilities issued policy guidance to the AUC on 28 February 2024 advising of anticipated policy,

---

<sup>52</sup> *Ibid.*

<sup>53</sup> Pathways Alliance, “Pathways Alliance File Regulatory Applications for Proposed CCS Transportation Network and Storage Hub,” *Carbon Capture Magazine* (3 April 2024), online: [perma.cc/6SRQ-3H5J].

<sup>54</sup> *Ibid.*

<sup>55</sup> Alta Reg 108/2023.

<sup>56</sup> Alberta, Lieutenant Governor in Council, *Order in Council*, OC 171/2023 (Edmonton: Government of Alberta, 2 August 2023) [*Renewables Inquiry*].

<sup>57</sup> Alberta Utilities Commission, *AUC Inquiry into the Ongoing Economic, Orderly and Efficient Development of Electricity Generation in Alberta: Module A Report* (Calgary: AUC, 31 January 2024), online: [perma.cc/RCX2-GBCD] [*Module A Report*].

<sup>58</sup> Alberta Utilities Commission, Notice, 28542, “AUC Inquiry into the Ongoing Economic, Orderly and Efficient Development of Electricity Generation in Alberta: AUC Inquiry Process for Module B” (24 October 2023), online: [perma.cc/3AUG-BBXZ].



legislative, and regulatory changes related to agricultural land uses, reclamation security requirements, buffer zones for viewscape impacts, and assessments, as well as development of renewable generation on Crown lands.<sup>59</sup> The AUC's Module A Report was issued to the public on 12 March 2024,<sup>60</sup> and the Module B Report was provided to the Minister of Affordability and Utilities on 28 March 2024.<sup>61</sup>

In contrast to Alberta's pause on renewable development, other jurisdictions have announced plans to procure new renewable energy generation to meet short and long-term supply targets. This includes the announcement made by Ontario's Independent Electricity System Operator on 11 December 2023 that the province will be procuring 5,000 MW of new generation from wind, solar, hydro, and biomass sources over the next five to ten years.<sup>62</sup> Nova Scotia also launched the first round of its Green Choice Program to procure 350 MW of new renewable electricity to be operational by 2027.<sup>63</sup> On 3 April 2024, BC Hydro issued a request for proposals to procure approximately 3,000 gigawatt hours per year of electricity.<sup>64</sup> To qualify for BC Hydro's request for proposals, projects must utilize clean or renewable resources, achieve commercial operation between 2028 and 2031, and have meaningful economic participation by one or more First Nations.<sup>65</sup>

## B. NUCLEAR

There continues to be significant interest in nuclear energy as a low emission source of electricity. Several federal tax incentives apply to nuclear energy equipment including the 30 percent refundable Clean Technology investment tax credit applicable to small modular reactors (SMRs).<sup>66</sup> Ontario's *Plan for a Clean Energy Future*<sup>67</sup> emphasizes the refurbishment and expansion of traditional nuclear generating facilities,<sup>68</sup> and the

---

<sup>59</sup> Letter from Nathan Neudorf to Bob Heggie (28 February 2024), online: [perma.cc/LWH9-34WQ].

<sup>60</sup> *Module A Report*, *supra* note 57.

<sup>61</sup> Alberta Utilities Commission, *AUC Inquiry into the Ongoing Economic, Orderly and Efficient Development of Electricity Generation in Alberta: Module B Report* (Calgary: AUC, 28 March 2024), online: [perma.cc/TQ9P-QCPF].

<sup>62</sup> Independent Electricity System Operator, *Evaluating Procurement Options for Supply Adequacy: A Resource Adequacy Update to the Minister of Energy* (Toronto: Independent Electricity System Operator, 11 December 2023), online: [perma.cc/PPN6-JPUE].

<sup>63</sup> Nova Scotia Department of Natural Resources and Renewables, News Release, "Green Choice Program for Large-Scale Electricity Customers" (1 December 2023), online: [perma.cc/LR95-A2EJ].

<sup>64</sup> BC Hydro, "2024 Call for Power" (3 April 2024), online: [perma.cc/QAB2-FTT7].

<sup>65</sup> BC Hydro, Request for Proposals, RFP No 20329, "BC Hydro Call for Power 2024" (3 April 2024), online: [perma.cc/ETD9-RBMK]. For the purposes of the request for proposals, "'clean or renewable resources' means biomass, biogas, geothermal heat, hydro, solar, ocean, wind or any other prescribed resource" (*ibid* at 7; *Clean Energy Act*, SBC 2010, c 22, s 1(1)).

<sup>66</sup> Department of Finance Canada, *Legislative Proposals Relating to the Income Tax Act and the Income Tax Regulations* (Ottawa: Minister of Finance, 4 August 2023) at 36(proposed subsection 127.45(1) relates to "clean technology property").

<sup>67</sup> Ministry of Energy and Electrification, *Powering Ontario's Growth: Ontario's Plan for a Clean Energy Future* (Toronto: King's Printer for Ontario, 7 July 2023).

<sup>68</sup> *Ibid* at 43-44, 64 (refurbishments of the Darlington Nuclear Generating Station and Bruce Nuclear Generating Station will secure 3,500 MW of generation until 2055 and 6,500 MW of generation until 2064, respectively. Pre-development studies underway for a new 4800 MW expansion at Bruce, which would be the first large scale nuclear build in Ontario since 1993); Government of Ontario, News Release, "Ontario Supporting Plan to Refurbish Pickering Nuclear Generating Station" (30 January 2024), online: [perma.cc/Q8KF-YEU6] (in January 2024, Ontario Power Generation announced its plan to obtain regulatory approval for refurbishing Pickering Nuclear Generating Station's "B" units to secure the generation of 2,000 MW from that facility).

development of SMRs as playing an important role in meeting future energy demands in line with the joint strategic SMR plan and interprovincial memorandum of understanding signed by the governments of Ontario, Saskatchewan, New Brunswick, and Alberta in 2022.<sup>69</sup> Early works are currently underway for a 300 MW SMR at Ontario's Darlington Nuclear Generating Station and the province plans to add three more SMR units in the coming years.<sup>70</sup> Long-term development plans for SMRs are also underway in Alberta,<sup>71</sup> Saskatchewan,<sup>72</sup> and New Brunswick.<sup>73</sup> On 2 May 2024, the governments of Saskatchewan and Alberta entered into a new bilateral memorandum of understanding to advance the development of nuclear power generation in both provinces with a focus on overcoming existing challenges and creating potential opportunities related to industrial decarbonization and grid reliability.<sup>74</sup> While the development of SMRs in Alberta and Saskatchewan may be significant to these provinces' ability to comply with the *Clean Electricity Regulations*, such opportunities present unique considerations for the regulatory regimes in each province. One such consideration that continues to attract legal attention is the disposal of nuclear waste streams. For example, Canadian Nuclear Laboratories' application for approval to construct a near surface disposal facility for low-level radioactive waste in Deep River, Ontario was the subject of a multi-year regulatory proceeding that concluded in 2023.<sup>75</sup> The Canadian Nuclear Safety Commission's January 2024 approval of the facility is the subject of a judicial review application by citizens' groups and the Kebaowek First Nation.<sup>76</sup>

---

<sup>69</sup> Governments of Ontario, New Brunswick, Alberta, and Saskatchewan, *A Strategic Plan for the Deployment of Small Modular Reactors* (March 2022), online: [perma.cc/DQ25-CKQW].

<sup>70</sup> Government of Ontario, News Release, "Ontario Building More Small Modular Reactors to Power Province's Growth" (07 July 2023), online: [perma.cc/FCN8-HMNK]; see also Canadian Nuclear Safety Commission, "Nuclear Reactor Facility — Darlington New Nuclear Project," online: [perma.cc/9Y5F-NBSL].

<sup>71</sup> Capital Power, Media Release, "Capital Power and Ontario Power Generation Partner to Advance New Nuclear in Alberta" (15 January 2024), online: [perma.cc/PH65-RWFW] (the Capital Power Corp. and Ontario Power Generation partnership was announced in January 2024); X-Energy Reactor Company, LLC, Press Release, "X-energy, TransAlta Partner to Study Development of Advanced Small Modular Nuclear Reactors in Alberta Through Emissions Reduction Alberta Award" (2 April 2024), online: [perma.cc/9SJW-PSSR] (the TransAlta Corporation and X-Energy Reactor Company, LLC partnership to study the feasibility of repurposing a fossil fuel electricity generation site for an SMR was subsequently announced in April 2024 and received \$600,000 in funding from Emissions Reduction Alberta).

<sup>72</sup> SaskPower, News Release, "SaskPower and GE Hitachi Sign Agreement to Advance Small Modular Reactor Development" (30 January 2024), online [perma.cc/QMH2-9GKF] ("SaskPower has selected the GE Hitachi BWRX-300 as the technology to be used in its SMR development work," the evaluation of two potential SMR sites is underway and a final investment decision is expected in 2029); SaskPower, "Potential Facility Location," online: [perma.cc/U3MX-NR94].

<sup>73</sup> NB Power, "Advanced Small Modular Reactors," online: [perma.cc/9E35-EKYN] (on 30 June 2023, New Brunswick Power initiated an Environmental Impact Assessment and filed an application with the Canadian Nuclear Safety Commission for a Licence to Prepare Site Application in respect of an advanced SMR to be located west of the existing Point Lepreau Nuclear Generating Station).

<sup>74</sup> Government of Saskatchewan, News Release, "Saskatchewan and Alberta Partner to Advance Nuclear Power Generation" (2 May 2024), online: [perma.cc/S7MJ-9DJR].

<sup>75</sup> *Re Canadian Nuclear Laboratories Application to Amend the Nuclear Research and Test Establishment Operating Licence for the Chalk River Laboratories Site to Authorize the Construction of a Near Surface Disposal Facility* (8 January 2024), DEC 22-H7, online: Canadian Nuclear Safety Commission [perma.cc/5UMT-J6B5].

<sup>76</sup> *Kebaowek First Nation et al v Canadian Nuclear Laboratories* (10 July 2024), Ottawa T-227-24 (FCTD) (Application for Judicial Review).

### C. ENERGY STORAGE

On 6 March 2024, the Alberta government proclaimed the *Electricity Statutes (Modernizing Alberta's Electricity Grid) Amendment Act, 2022*.<sup>77</sup> Concurrently, AUC Bulletin 2024-04<sup>78</sup> announced the coming into force of the updated *Hydro and Electric Energy Regulation*.<sup>79</sup> The updated *HEER* introduces a process for energy storage facility applications and modifies “the approval processes for alterations to existing facilities and ... connection applications.”<sup>80</sup> The updates generally reduce reporting and application requirements and support energy storage, self-supply, and export.<sup>81</sup> The impact of the *HEER* amendments remains to be seen pending anticipated policy and legislative changes regarding electricity generation, storage, transmission, and distribution in Alberta, many of which are discussed below.

### D. ELECTRICITY MARKET DESIGN

Following the *Renewables Inquiry*, the Government of Alberta has forecasted significant electricity market reform based on reports from the Alberta Electric System Operator (AESO)<sup>82</sup> and the Market Surveillance Administrator (MSA)<sup>83</sup> released on 11 March 2024,<sup>84</sup> calling for a restructured energy market and interim action to support more effective competition and price stability. To moderate price fluctuations in the near-term, the provincial government has accepted recommendations from MSA to impose an interim price cap on offers from all non-renewable and non-storage generators with 5 percent or more total market share, which has been codified in the *Market Power Mitigation Regulation*,<sup>85</sup> set to expire on 30 November 2027. The government also accepted the MSA's recommendations relating to supply adequacy by passing the *Supply Cushion Regulation*,<sup>86</sup> which will also expire on 30 November 2027. The *Supply Cushion Regulation* requires AESO to issue unit commitment directives to long lead time generators when it forecasts a supply cushion below the threshold of 932 MW.<sup>87</sup> Rules to facilitate the implementation of both regulations are required to be in effect by 1 July 2024.<sup>88</sup>

### E. TRANSMISSION

Complementary to the significant reforms anticipated for Alberta's electricity market, Alberta's Ministry of Affordability and Utilities issued a “green paper” on 23 October 2023

---

<sup>77</sup> SA 2022, c 8.

<sup>78</sup> Alberta Utilities Commission, Bulletin, 2024-04, “AUC Updates to the Hydro and Electric Energy Regulation” (6 March 2024), online: [perma.cc/6UKS-ZMCU] [AUC, “HEER Updates”].

<sup>79</sup> Alta Reg 32/2024 [*HEER*].

<sup>80</sup> AUC, “HEER Updates,” *supra* note 78.

<sup>81</sup> See e.g. *HEER*, *supra* note 79, s 3(2).

<sup>82</sup> Alberta Electric System Operator, *Alberta's Restructured Energy Market: AESO Recommendation to the Minister of Affordability and Utilities* (Calgary: AESO, 31 January 2024), online: [perma.cc/KY2E-H9V8].

<sup>83</sup> Market Surveillance Administrator, *Advice to Support More Effective Competition in the Electricity Market: Interim Action and an Enhanced Energy Market for Alberta* (Market Surveillance Administrator, 21 December 2023), online: [perma.cc/J6F6-ZXN8].

<sup>84</sup> Letter from Nathan Neudorf to Bob Heggie (11 March 2024), online: [perma.cc/Z998-642V].

<sup>85</sup> Alta Reg 43/2024 [*MPMR*].

<sup>86</sup> Alta Reg 42/2024 [*SCR*].

<sup>87</sup> *Ibid*, ss 1(1)(i), 5.

<sup>88</sup> *Ibid*, s 9(2); *MPMR*, *supra* note 85, s 6(2).

highlighting anticipated changes to transmission system planning in the province that are expected to unfold in 2024.<sup>89</sup> In addition to a number of near-term amendments to Alberta's *Transmission Regulation*,<sup>90</sup> including removal of prescribed Generating Unit Owner's Contribution rates, shifting to a system wide average for line loss calculation and the expansion of non-wires solutions for reliability, the province has forecasted wide sweeping policy changes to transmission system planning in the long-term.<sup>91</sup> Broader policy changes could include a shift away from the zero-congestion policy that has been fundamental to Alberta's deregulated electricity market, the reallocation of transmission and ancillary services costs to generators, as well as policies on the development and restoration of transmission interties connecting the Alberta grid to neighbouring provinces.

## F. INTERTIES

Policies such as the *Clean Electricity Regulations* often reference the fact that 84 percent of electricity generated in Canada is from low and non-emitting sources, such as nuclear and hydro.<sup>92</sup> However, these types of electricity generation are not evenly distributed across the country and interconnections between provincial electricity grids — referred to as interties — are expected to be an important part of transitioning toward net-zero emissions from the electricity sector in Canada.<sup>93</sup> Interties, and the question of whether they are managed in a way that ensures fair market access, are the subject of two regulatory proceedings of interest: (1) the NorthPoint Energy Solutions Inc. (NorthPoint) complaint against Manitoba Hydro Electric Board (Manitoba Hydro) before the Canada Energy Regulator (CER);<sup>94</sup> and (2) BHE Canada Limited's (BHE) complaint against the AESO before AUC.<sup>95</sup>

NorthPoint is a wholly owned subsidiary of SaskPower responsible for trading power in Canadian and United States markets. NorthPoint's complaint was filed in November 2023 and alleges that Manitoba Hydro has prioritized buyers in the US via its intertie with Montana and the Midcontinent Independent System Operator over domestic buyers such as SaskPower, contrary to the terms of its electricity export permit.<sup>96</sup> There is speculation that the *NorthPoint Complaint* could influence the federal government to develop policies that incentivize domestic interties, particularly given the recommendations put forward by

---

<sup>89</sup> Ministry of Affordability and Utilities, *Transmission Policy Review: Delivering the Electricity of Tomorrow* (Edmonton: Government of Alberta, 23 October 2023) [Alberta MAU, *Transmission Policy Review*].

<sup>90</sup> Alta Reg 86/2007.

<sup>91</sup> Alberta MAU, *Transmission Policy Review*, *supra* note 89.

<sup>92</sup> *Clean Electricity Regulations*, *supra* note 32 at 2716.

<sup>93</sup> Environment and Climate Change Canada, *A Clean Electricity Standard in Support of a Net-Zero Electricity Sector* (Discussion Paper), (Gatineau: ECCC, 2022) at 11; Canada Electricity Advisory Council, *Powering Canada: A Blueprint for Success* (Final Report), Catalogue No M134-72/2024E-PDF (Ottawa: Minister of Natural Resources Canada, 2024) [*Powering Canada*].

<sup>94</sup> *NorthPoint Energy Solutions Inc v Manitoba Hydro-Electric Board: Ruling No 1 — Manitoba Hydro-Electric Board request for time extension* (4 March 2024), File No 3430456, online: Canada Energy Regulator [perma.cc/Y978-ZVGF] [*NorthPoint Complaint*].

<sup>95</sup> Alberta Utilities Commission, *Notice of Complaint: BHE Canada Limited Notice of Complaint Regarding the Tariff, Rules, Reliability Standards, Practices and Conduct of the Alberta Electric System Operator*, Application No 28829-A001 (Calgary: AUC, 15 February 2024) [*BHE Complaint*].

<sup>96</sup> Canada, National Energy Board, *Manitoba Hydro-Electric Board's Application Dated 29 May 2015 for Authorization to Export Electricity Pursuant to Section 119.03 of the National Energy Board Act*, Permit EPE-404 (30 July 2015), online: [perma.cc/G9TE-G757].

the Canada Electricity Advisory Council relating to federal funding of inter-regional transmission projects.<sup>97</sup> As such, the proceeding is likely to be closely watched by energy lawyers, particularly those with a focus on electricity transmission. The oral hearing is currently scheduled for August 2024.<sup>98</sup>

In contrast to NorthPoint's alleged prioritization of market participants from the US, the *BHE Complaint* alleges that such market participants have been discriminated against by AESO. The *BHE Complaint* alleges that AESO has, through its tariff, rules, and reliability standards, systematically discriminated against intertie and import customers, particularly those from the US, and has thereby deprived them of a reasonable opportunity to access Alberta's wholesale electricity market.<sup>99</sup> AUC's complaint jurisdiction over AESO is established by sections 25 and 26 of the *Electric Utilities Act*, which permit or require AUC to dismiss complaints if they have been, or should be, investigated by MSA, or if the substance of the complaint has already been dealt with by the Commission or any other body.<sup>100</sup> Following an initial comment process, MSA advised AUC that it had commenced an investigation into the conduct of AESO regarding, among other things, the management of transmission constraints and system capability, capacity, utilization, and planning.<sup>101</sup> On 30 April 2024, AUC issued a preliminary ruling dismissing portions of the *BHE Complaint* that overlap with the MSA investigation or relate to matters already dealt with by AUC.<sup>102</sup> BHE filed an application for review and variance of the AUC ruling, and the process for considering the remaining portions of the complaint is yet to be determined.<sup>103</sup>

A less combative intertie development is Nova Scotia's recent approval of the NS-NB Reliability Intertie Project (the NS-NB Project).<sup>104</sup> The NS-NB Project is a proposed 345 kilovolt transmission line between Nova Scotia and New Brunswick that will increase reliability in both provinces and support the integration of anticipated wind power projects to Nova Scotia's grid in addition to the interconnection of New Brunswick's Point Lepreau nuclear generating station.<sup>105</sup> The NS-NB Project is the first phase of a modified Atlantic

---

<sup>97</sup> *Powering Canada*, *supra* note 93 at 19, 125–29.

<sup>98</sup> *NorthPoint Energy Solutions Inc v Manitoba Hydro-Electric Board: Procedural Update No 3 — Confidentiality agreement parameters, updates to the remaining process, and pre-hearing conference* (17 April 2024), File No 3430456 at 11, online: Canada Energy Regulator [perma.cc/4U32-85VH].

<sup>99</sup> *Re BHE Canada Limited Complaint Regarding the Tariff, Rules, Reliability Standards, Practices and Conduct of the Alberta Electric System Operator* (30 April 2024), 28829-X0068 at para 23 [*BHE Complaint Decision*].

<sup>100</sup> SA 2003, c E-5.1.

<sup>101</sup> *BHE Complaint Decision*, *supra* note 99 at para 6.

<sup>102</sup> *BHE Complaint Decision*, *supra* note 99 at paras 38, 52–54, 60.

<sup>103</sup> *Re BHE Canada Application for Review of Ruling on Treatment of BHE Complaint* (14 June 2024), 29037-D01-2024, online: Alberta Utilities Commission [perma.cc/29PB-Q24M].

<sup>104</sup> Letter from Honourable Timothy Halman to Peter Gregg (15 December 2023), online: [perma.cc/H44R-GBNY].

<sup>105</sup> Nova Scotia Department of Natural Resources and Renewables, "Nova Scotia's 2030 Clean Power Plant" (11 October 2023) at 18, 21, online (pdf): [perma.cc/EGT6-3RCG].; Taryn Grant, "Nova Scotia Power Asks for OK to Build New Line to New Brunswick, Doubling Capacity," *CBC News* (26 October 2023), online: [perma.cc/FP5V-G4U8].

Loop which would have connected Quebec’s hydro generation with the Maritime provinces.<sup>106</sup>

## G. DISTRIBUTION

On 24 January 2024, AUC released “a report analyzing Alberta’s electricity distribution system in the context of achieving net-zero emissions goals.”<sup>107</sup> AUC, writing about the report, states:

According to the report, [AUC estimates that] the cost of reaching net-zero for Alberta’s electricity distribution system could be approximately \$3 billion by 2050, in addition to ... costs for distribution facility operators. However, substantial cost reductions — up to \$800 million — can be achieved through system optimization.... These costs are expected to be driven by the need for substantial infrastructure investment, electric vehicle and residential solar adoption, and necessary enhancements to accommodate the deployment and electrification of distributed energy resources.<sup>108</sup>

## IV. CRITICAL MINERALS

Critical minerals continue to be a priority of governments in the context of resource development. Over the past few years, multiple governments across Canada have released strategies to encourage the development of critical minerals.<sup>109</sup> As a natural next step, governments and regulators have now shifted to incentivizing and establishing a regulatory framework to govern such development.

### A. FEDERAL FUNDING

In October 2023, the federal government launched the first call for proposals for the Critical Minerals Infrastructure Fund.<sup>110</sup> \$300 million in contribution funding is available under two streams.<sup>111</sup> “Stream 1” funds are for preconstruction activities, including feasibility studies, planning, design work and stakeholder engagement.<sup>112</sup> “Stream 2” funds are for shovel-ready projects and may be used for preparation, construction, rehabilitation, and similar costs.<sup>113</sup> The funding is capped at \$50 million per project for non-governmental applicants and \$100 million per project for provincial and territorial governments.<sup>114</sup>

<sup>106</sup> Marian Yuzda et al, “Recent Legislative and Regulatory Developments of Interest to Energy Lawyers” (2023) 61:2 *Alta L Rev* 483 at 489.

<sup>107</sup> Lauren Aspden, “Net-Zero Analysis of Alberta’s Electricity Distribution System” (24 January 2024), online (blog): [perma.cc/3DH9-QC49].

<sup>108</sup> *Ibid.*

<sup>109</sup> See e.g. Government of Alberta, *Renewing Alberta’s Mineral Future: A Strategy to Re-Energize Alberta’s Minerals Sector* (Edmonton: Ministry of Energy, November 2021); Government of Canada, *The Canadian Critical Minerals Strategy* (Ottawa: Ministry of Natural Resources, December 2022); Government of Ontario, *Ontario’s Critical Mineral Strategy: Unlocking Potential to Drive Economic Recovery and Prosperity* (Toronto: Government of Ontario, March 2022).

<sup>110</sup> Natural Resources Canada, News Release, “Government of Canada to Enhance Critical Minerals Sector with Launch of \$1.5 Billion Infrastructure Fund” (31 October 2023), online: [perma.cc/7P5X-EP2Q].

<sup>111</sup> Natural Resources Canada, “Critical Minerals Infrastructure Fund — Contribution Funding,” online: [perma.cc/PE6D-4JFL].

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

## **B. ALBERTA MINERAL RESOURCES DEVELOPMENT ACT**

Alberta's strategy to develop metallic and industrial minerals has been under development for the last several years. The *Mineral Resource Development Act* was initially passed in 2021 and serves as the cornerstone of this strategy.<sup>115</sup> In addition to centralizing the regulatory functions for minerals exclusively under AER jurisdiction, *MRDA* split the regulation of minerals into two groups — brine-hosted minerals and rock-hosted minerals. The portions of *MRDA* and related regulations pertaining to brine-hosted mineral development came into effect on 1 March 2023.<sup>116</sup> The portions of *MRDA* relating to rock-hosted minerals came into effect on 28 February 2024, together with regulations to establish permitting, licensing, approval, and operating standards for rock-hosted mineral resource development.<sup>117</sup> AER has issued accompanying directives regarding each type of mineral resource.<sup>118</sup> This regulatory framework applies to exploration and development of numerous critical minerals including lithium, uranium, potash, and rare earth elements.<sup>119</sup> Centralizing the regulatory functions for critical minerals under AER is expected to enable AER to address conflicts between oil and gas and mineral resource development, and is intended to minimize regulatory burdens for developers via a single window for resource development.

## **C. SASKATCHEWAN HELIUM AND BRINE MINERAL TENURE**

In October 2023, the Saskatchewan government introduced the Helium and Brine Mineral Tenure Policy.<sup>120</sup> The policy allows overlapping helium and brine mineral tenure dispositions to “be issued in the same stratigraphic horizon and land location without [the prior] consent [of the tenure holders].”<sup>121</sup> This policy applies on a go forward basis as of 16 October 2023.<sup>122</sup> Therefore, consent must still be obtained from helium or brine mineral tenure holders that were issued such rights prior to 16 October 2023. The policy is expected to provide additional certainty for mineral tenure rights holders in the context of an anticipated increase in exploration and development of helium and brine minerals in the coming years.

## **V. OIL AND GAS**

Liability management continues to be an area of regulatory development for the oil and gas sector. The British Columbia Energy Regulator (BCER) has increased the stringency of requirements under its Permittee Capability Assessment (PCA) program and AER

---

<sup>115</sup> SA 2021, c M-16.8 [*MRDA*].

<sup>116</sup> *Ibid.*, s 62. *Brine-Hosted Mineral Resource Development Rules*, Alta Reg 17/2023.

<sup>117</sup> *MRDA*, *ibid.* *Rock-Hosted Mineral Resource Development Rules*, Alta Reg 14/2024.

<sup>118</sup> Alberta Energy Regulator, *Brine-Hosted Mineral Resource Development*, Directive 090 (AER, 2 March 2023), online: [perma.cc/ZQ3G-TA86]; Alberta Energy Regulator, *Rock-Hosted Mineral Resource Development*, Directive 091 (AER, 29 February 2024), online: [perma.cc/MVC9-75R2].

<sup>119</sup> *MRDA*, *supra* note 115, s 1(1)(p).

<sup>120</sup> Saskatchewan Ministry of Energy and Resources, Bulletin, BT2023-011 “Helium and Brine Mineral Tenure Policy” (16 October 2023), online: [perma.cc/HJ9D-C4FY].

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*



continues to roll out the components of its Liability Management Framework. Court and regulatory decisions pertaining to AlphaBow Energy Ltd. (AlphaBow) highlight important procedural points for energy lawyers engaging with regulatory appeals and provide some insight into AER's approach to compliance and enforcement in the context of its liability management regime.

#### A. BRITISH COLUMBIA LIABILITY MANAGEMENT FRAMEWORK UPDATES

April 2023 marked one year since BCER introduced its PCA program to replace the previous liability management rating program.<sup>123</sup> The PCA program requires licensees to either submit security deposits or complete abandonment, assessment, remediation, or restoration work on their dormant, inactive, and marginal (DIM) sites if their financial risk is assessed as moderate or high under the program.<sup>124</sup> In the first year of the PCA program, permittees with an assessed risk factor over 83.3 had to provide 100 percent corrective action against their DIM liability, subject to a cap of \$10 million or 50 percent of the permittee's DIM liability.<sup>125</sup> Effective 1 June 2023, the 100 percent corrective action requirements are triggered if a permittee's assessed risk factor is over 66.6. While the \$10 million cap remains in place, the corrective action requirements will no longer be limited to 50 percent of the permittee's DIM liability.<sup>126</sup> As of 1 June 2024, the PCA program was expanded to include dormant facilities and pipelines,<sup>127</sup> potentially increasing permittees' DIM liabilities and associated corrective action requirements. This expansion of the PCA program aligns with amendments to the *Dormancy and Shutdown Regulation* which, as of 1 January 2024, prescribes timelines for the restoration of dormant pipelines and facilities in addition to dormant wells.<sup>128</sup>

#### B. ALBERTA LIABILITY MANAGEMENT FRAMEWORK UPDATES

Implementation of the AER's Liability Management Framework<sup>129</sup> has continued over the past year, including updates to the Inventory Reduction Program under Directive 088 (*Licensee Life-Cycle Management*),<sup>130</sup> and the announcement of forthcoming changes to the AER's security framework and other elements of the liability management regime.

The Inventory Reduction Program includes two components: the closure nomination process and closure spend quotas, the latter of which has been subject to some changes this

---

<sup>123</sup> British Columbia Energy Regulator, Information Update, "Changes to the Permittee Capability Assessment (PCA) Program (TU 2023-06)" (17 May 2023), online: [perma.cc/U9MD-UDX7].

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> British Columbia Energy Regulator, Technical Update, "Program Expands to Include Dormant Facility & Pipeline Liability (TU 2024-03)" (18 March 2024), online: [perma.cc/P938-JRCJ].

<sup>128</sup> *Dormancy and Shutdown Regulation*, BC Reg 112/2019.

<sup>129</sup> In July 2020, the Government of Alberta announced a new liability management framework to mitigate growing liabilities associated with inactive and orphaned wells in Alberta and directed AER to develop and implement this framework: Government of Alberta, "Oil and Gas Liabilities Management" (2024), online: [perma.cc/4X6P-SALY].

<sup>130</sup> Alberta Energy Regulator, *Licensee Life-Cycle Management*, Directive 088 (AER, 13 February 2023), online: [perma.cc/VMV4-FQCJ] [AER, Directive 088].

year. AER sets an annual industry-wide closure spend requirement (\$700 million for 2024), as well as a mandatory closure spend quota for each licensee.<sup>131</sup> In 2022 and 2023, licensees could commit to a supplemental closure spend in exchange for leniency on other regulatory requirements.<sup>132</sup> Specifically, if a licensee committed to a supplemental closure spend and submitted a confirmed area-based closure project to AER, they would receive a two year extension to the deadline for removing surface equipment from surface-abandoned wells and a three year extension for otherwise expired Crown mineral leases.<sup>133</sup> As of 1 January 2024, these extensions are no longer available and licensees are not able to commit to a supplemental closure spend quota.<sup>134</sup>

AER published its 2022 Liability Management Performance Report on 17 January 2024.<sup>135</sup> The report highlights that AER licensees spent over \$696 million on closure activities in 2022, surpassing the industry-wide closure spend requirement of \$422 million by 65 percent.<sup>136</sup> It is unclear whether the exemption related incentives for supplemental closure spending contributed to this performance. AER is exploring opportunities to improve the Inventory Reduction Program,<sup>137</sup> but it remains to be seen if similar incentives will be implemented to increase closure spending going forward.

Ongoing implementation of the Liability Management Framework will also include replacing the Liability Management Rating (LMR), which was previously the cornerstone of AER's liability management regime. AER has been working to phase out the LMR for several years, having identified that it is not an accurate measure of a licensee's ability to address its regulatory and environmental liabilities.<sup>138</sup> While the holistic licensee assessment outlined in Directive 088 has replaced the LMR for the purpose of assessing licence transfer applications,<sup>139</sup> complete replacement of the LMR has been challenging because the LMR is integrated into numerous AER Directives and the *Oil and Gas Conservation Rules*.<sup>140</sup> On 16 November 2023, AER issued Bulletin 2023-45, signaling its intent to replace the LMR and establish a new security framework through amendments to Directives 001, 006, 011, 024, 068, 075, 088, Manual 023, and the *OGCR*.<sup>141</sup> Stakeholder consultation regarding these amendments will take place in 2024 and draft documents will be available for public comment before being finalized.<sup>142</sup>

---

<sup>131</sup> Alberta Energy Regulator, "Closure Spend Quotas," online: [perma.cc/C8QF-LJ9D] [AER, "Quotas"].

<sup>132</sup> *Ibid.*

<sup>133</sup> Alberta Energy Regulator, *Licensee Life-Cycle Management*, Manual 023 (Calgary: AER, April 2024), ss 4.2.2-4.2.3 [AER, Manual 023].

<sup>134</sup> *Ibid.*, s 4.2.2.

<sup>135</sup> Alberta Energy Regulator, "Liability Management Performance Report" (January 2024), online: [perma.cc/JUU9-4U2B].

<sup>136</sup> *Ibid.*

<sup>137</sup> AER, "Quotas," *supra* note 131.

<sup>138</sup> Alberta Energy Regulator, "Liability Management," online: [perma.cc/76CH-5E6U].

<sup>139</sup> Alberta Energy Regulator, "Holistic Assessment and Licensee Capability Assessment," online: [perma.cc/GB6X-GQWX].

<sup>140</sup> See e.g. *Oil and Gas Conservation Rules*, Alta Reg 151/1971, s 1.100(b.1) [*OGCR*] (which states that AER "may require a licensee to provide a security deposit ... at any time the licensee fails a liability management rating assessment conducted by [AER]").

<sup>141</sup> Alberta Energy Regulator, Bulletin, 2023-41, "Ongoing Implementation of the Liability Management Framework" (16 November 2023), online: [perma.cc/DKE5-MPGV].

<sup>142</sup> *Ibid.*

While few details have been provided, AER has identified the principles that will guide its development of a new framework to collect security from licensees beginning in late 2024. Among other things, the new security framework will apply throughout the energy development life cycle rather than focusing on end of life and licence transfer applications. It is also expected to leverage the Directive 088 holistic assessment process as well as “requirements and processes that are explicit and defined.”<sup>143</sup> Under the current security framework, AER retains significant discretion when determining the amount of security to collect.<sup>144</sup> Whether such discretion is maintained as part of the new security framework will likely be a point of interest for industry stakeholders and energy lawyers.

### C. ALPHABOW ENERGY LTD. REGULATORY APPEALS

#### 1. BACKGROUND

AlphaBow is a privately owned Alberta oil and gas company that, as of the time of writing, holds approximately 8,147 AER licences.<sup>145</sup> The company was created through a series of amalgamations in 2018 and has experienced several financial and regulatory compliance challenges.<sup>146</sup> AlphaBow and AER’s Closure and Liability Management (CLM) branch had been meeting regularly since 2019 to ensure, among other things, that AlphaBow was appropriately managing its liabilities.<sup>147</sup> As of February 2024, these liabilities amounted to \$264 million, approximately 58 percent of which (\$155 million) related to inactive or abandoned sites.<sup>148</sup> Following AlphaBow’s non-compliance with an initial enforcement order,<sup>149</sup> CLM issued an order on 30 March 2023 (the March Order) that required AlphaBow to, among other things, submit a reasonable care and measures plan for its assets, submit an abandonment plan for its wells with expired mineral leases, and post a security deposit of \$15 million — 10 percent of AlphaBow’s inactive liability.<sup>150</sup> AlphaBow requested a regulatory appeal and a stay of the March Order pending the outcome of the regulatory appeal.<sup>151</sup> AER reserved its decision on the regulatory appeal but denied AlphaBow’s stay request on 10 May 2023 (the AER Stay Decision).<sup>152</sup> After AlphaBow failed to comply with certain aspects of the March Order, CLM ordered

---

<sup>143</sup> *Ibid* at 2.

<sup>144</sup> See e.g. AER, Manual 023, *supra* note 133, ss 6.1, 6.1.2.

<sup>145</sup> *AlphaBow Energy Ltd Regulatory Appeals 1943516 and 1943521 of AER Orders* (28 February 2024), ABAER 001 at para 3, online: Alberta Energy Regulator [perma.cc/92K5-T7BY] [*AER AlphaBow Decision*].

<sup>146</sup> *Ibid* at paras 3–4.

<sup>147</sup> *Ibid* at para 4.

<sup>148</sup> *Ibid* at para 3.

<sup>149</sup> Letter from Tyler Callicott to Ben Li (28 July 2022), Alberta Energy Regulator, *Directive 067 Eligibility Status of AlphaBow Energy Ltd.* (Edmonton: AER, 2022), online: [perma.cc/EXZ8-YA6U].

<sup>150</sup> *Re Alberta Energy Regulator* (30 March 2023), Order 202303-58, online: Alberta Energy Regulator [perma.cc/AJ52-FRCK].

<sup>151</sup> *AlphaBow Energy Ltd Request for Regulatory Appeal* (10 May 2023), Appeal No 1942793, online: Alberta Energy Regulator [perma.cc/S42X-9M29].

<sup>152</sup> *Ibid* at 5.

AlphaBow to suspend its operations pursuant to section 27 of the *Oil and Gas Conservation Act*<sup>153</sup> and section 23 of the *Pipeline Act*<sup>154</sup> on 5 June 2023 (the June Order).<sup>155</sup>

## 2. COURT OF APPEAL

AlphaBow engaged the Court of Appeal of Alberta with respect to each of the AER decisions and orders noted above. Having missed the deadline to file an application for permission to appeal the March Order, AlphaBow asked the Court to stay certain portions of the March Order and requested permission to appeal the AER Stay Decision.<sup>156</sup> The Court considered whether Rules 3.23(1), 14.37(1), or 14.48 of the *Alberta Rules of Court*<sup>157</sup> provided it with the requisite authority to stay portions of the March Order, even though the March Order was not under appeal.<sup>158</sup> Respectively, these Rules authorize the Court to “stay the operation of a decision or act sought to be set aside under an originating application for judicial review pending final determination of the originating application,” “hear and decide any application incidental to an appeal,” and “stay proceedings or enforcement of a decision pending appeal.”<sup>159</sup> The Court held that none of these Rules are broad enough to authorize staying an AER order that is not the subject of a permission to appeal application.<sup>160</sup> The Court’s decision highlights the importance of statutory appeal deadlines and confirms that courts do not have the authority to stay a different AER decision than the one that is under appeal.

AlphaBow’s application for permission to appeal the AER Stay Decision was dismissed on the basis that it did not engage a question of law or jurisdiction,<sup>161</sup> and AlphaBow’s subsequent application for permission to appeal the June Order was adjourned *sine die* pending the outcome of the AER’s regulatory appeal proceeding.<sup>162</sup>

## 3. THE REGULATORY APPEALS

AER considered AlphaBow’s regulatory appeals of both the March Order and the June Order (collectively, the Orders) at a hearing in late 2023.<sup>163</sup> The regulatory appeals focused on AlphaBow’s allegations that the Orders were procedurally unfair and that the requirements imposed by the Orders were unreasonable. The AER reconsideration panel (the Panel) determined that AlphaBow had adequate notice and opportunity to be heard,<sup>164</sup> and that AlphaBow had presented insufficient evidence to support its reasonable apprehension of bias allegation.<sup>165</sup> In response to AlphaBow’s argument that the Orders did

---

<sup>153</sup> RSA 2000, c O-6 [OGCA].

<sup>154</sup> RSA 2000, c P-15.

<sup>155</sup> *Re Alberta Energy Regulator* (5 June 2023), Order 202306-09, online: Alberta Energy Regulator [perma.cc/K7G4-LW7T].

<sup>156</sup> *AlphaBow Energy Ltd v Alberta Energy Regulator*, 2023 ABCA 164 at paras 4–6 [*Alphabow* ABCA 164].

<sup>157</sup> *Alta Reg* 124/2010, vol 1 [Rules].

<sup>158</sup> *AlphaBow* CA 164, *supra* note 156 at para 7.

<sup>159</sup> Rules, r 3.23(1), 14.37(1), 14.48.

<sup>160</sup> *AlphaBow* ABCA 164, *supra* note 156 at paras 16, 29–45.

<sup>161</sup> *AlphaBow Energy Ltd v Alberta Energy Regulator*, 2023 ABCA 221 at para 18.

<sup>162</sup> *AlphaBow Energy Ltd v Alberta Energy Regulator*, 2023 ABCA 239.

<sup>163</sup> *AER AlphaBow Decision*, *supra* note 145.

<sup>164</sup> *Ibid* at paras 41–70.

<sup>165</sup> *Ibid* at paras 75–106.

not align with AER norms, guidelines, and precedents, the Panel highlighted that AER has “significant discretion and flexibility” when selecting appropriate compliance and enforcement measures.<sup>166</sup> The Panel also held that CLM “did not exercise its discretion to issue the [Orders] in a manner that was unreasonable.”<sup>167</sup> Among other things, the Panel accepted that the \$15 million “security deposit was necessary and appropriate to offset the potential costs of managing AlphaBow’s [closure] obligations.”<sup>168</sup>

AlphaBow argued that the June Order, which requires it to cease operations, was unreasonable because it would cut off AlphaBow’s cash flow and force it into insolvency.<sup>169</sup> In AlphaBow’s submission, this would shift assets to the Orphan Well Association and harm, rather than protect, the public and the environment.<sup>170</sup> The Panel determined that the June Order was not intended to force AlphaBow into insolvency “and was a reasonable escalation of enforcement in the circumstances.”<sup>171</sup> Finally, the Panel considered AlphaBow’s argument that section 27 of the *OGCA* can only be used: (a) on a site-specific basis (rather than for a company-wide suspension); and (b) when AER provides justification that the sites at issue pose a risk to the public or the environment.<sup>172</sup> AlphaBow’s argument focused on section 27(3) of the *OGCA* which states that AER “may order that a well or facility be suspended or abandoned where the Regulator considers that it is necessary to do so in order to protect the public or the environment.”<sup>173</sup> While the Panel acknowledged that AER does not get a “free pass” and must provide justification when seeking to address multiple sites in a single section 27 order, it would be “unwieldy and nonsensical” to require site-specific justifications in situations where a licensee’s overall record demonstrates a need for broad enforcement action.<sup>174</sup> The panel highlighted that AlphaBow holds over 8,000 AER licences, which would make a site-specific approach particularly challenging.<sup>175</sup>

#### 4. COMMENTARY

The series of AlphaBow decisions in the past year provide helpful commentary on procedural issues for regulatory lawyers dealing with internal regulatory appeals and stay applications, including the appeal of such decisions to the Court of Appeal of Alberta. The AER’s regulatory appeal decision also provides interpretive guidance with respect to section 27 of the *OGCA* and the scope of AER’s compliance and enforcement powers in the context of the evolving Liability Management Framework.

---

<sup>166</sup> *Ibid* at paras 58, 107–109.

<sup>167</sup> *Ibid* at paras 161, 223–24.

<sup>168</sup> *Ibid* at para 140.

<sup>169</sup> *Ibid* at para 225.

<sup>170</sup> *Ibid* at paras 211–12.

<sup>171</sup> *Ibid* at paras 220–24, 233–36.

<sup>172</sup> *Ibid* at paras 241–61.

<sup>173</sup> *OGCA*, *supra* note 153, s 27(1). Similar language is used in section 23(2) of the *Pipeline Act*, *supra* note 154 (“[t]he Regulator may order that a pipeline be discontinued or abandoned where the Regulator considers that it is necessary to do so in order to protect the public or the environment” [emphasis added]).

<sup>174</sup> *AER AlphaBow Decision*, *supra* note 145 at para 257.

<sup>175</sup> *Ibid*.

## VI. PIPELINES

The Trans Mountain Expansion Project continues to attract attention as it seeks CER approval for its Commencement Date Tolls. Regulatory developments in the pipeline sector also include amendments to the Alberta *Pipeline Rules* and increased attention to the energy transition by regulators when deciding on applications pertaining to natural gas pipelines. These decisions provide a glimpse into how regulators may grapple with decarbonization initiatives in the context of future pipeline development.

### A. TRANS MOUNTAIN PIPELINE EXPANSION INTERIM TOLL

On 30 November 2023, CER issued a preliminary decision regarding Trans Mountain Pipeline ULC's (Trans Mountain) application for interim tolls for the expanded Trans Mountain Pipeline System.<sup>176</sup> CER approved Trans Mountain's commencement date tolls on an interim basis, enabling Trans Mountain to begin charging shippers at the commencement date.<sup>177</sup> The approved benchmark toll of \$11.46 per barrel was calculated based on Trans Mountain's most recent cost estimate for the Trans Mountain Pipeline System at the time of application, its forecasted shipment volumes, and variable costs.<sup>178</sup> The fixed cost portion of the applied-for toll is nearly double the amount that Trans Mountain had estimated in 2017.<sup>179</sup>

A more detailed analysis of Trans Mountain's proposed tolls is ongoing as part of the final interim tolls hearing.<sup>180</sup> Several shippers have intervened in the proceeding, which is scheduled to be set down for oral hearing in early 2025. Among other things, the "List of Issues" set by CER includes the question of "[w]hether [the] significant costs and expenses allocated to Uncapped Costs were reasonably and necessarily incurred, as stipulated in the Facility Support Agreement."<sup>181</sup> CER intends to consider and issue final determinations regarding as many of the outstanding tolls issues as possible in the context of the final interim tolls proceeding, with final tolls to be subject to true-up for actual costs determined following the completion of construction.<sup>182</sup>

---

<sup>176</sup> *Application for Interim Commencement Date Tolls and Other Matters related to the Transportation of Petroleum on the Expanded Trans Mountain Pipeline System: Preliminary Decision* (30 November 2023), RH-002-2023, online: Canada Energy Regulator [perma.cc/KKM4-GFJ6].

<sup>177</sup> *Ibid* at 3.

<sup>178</sup> *Ibid* at 4–5.

<sup>179</sup> *Ibid* at 5.

<sup>180</sup> *Ibid*.

<sup>181</sup> *Application for Interim Commencement Date Tolls and Other Matters Related to the Transportation of Petroleum on the Expanded Trans Mountain Pipeline System: Process Letter No 3* (12 October 2023), RH-002-2023 at Appendix 1, online: Canada Energy Regulator [perma.cc/HX44-Q8A4].

<sup>182</sup> *Application for Interim Commencement Date Tolls and Other Matters Related to the Transportation of Petroleum on the Expanded Trans Mountain Pipeline System: Process Letter No 2* (1 August 2023), RH-002-2023, online: Canada Energy Regulator [perma.cc/XN62-AJ8U].

## B. UPDATED ALBERTA *PIPELINE RULES*

Following a brief pause on new pipeline applications,<sup>183</sup> AER announced updates to the *Pipeline Rules*<sup>184</sup> that came into effect on 15 November 2023.<sup>185</sup> Among other things, the updates permit the use of temporary surface pipelines for water conveyance, allow licensees up to 24 months to discontinue, abandon, or resume a pipeline managed under an integrity management program, and allow for some system-wide abandonments without disconnecting tie-ins.<sup>186</sup> The updated *Pipeline Rules* also incorporate long-standing AER policy that had previously been communicated through bulletins, such as Bulletin 2015-34 regarding the management of pipeline records in the context of licence transfer applications.<sup>187</sup> AER directives and manuals pertaining to pipelines, such as Directives 077<sup>188</sup> and 056,<sup>189</sup> and Manuals 005<sup>190</sup> and 012,<sup>191</sup> were also updated to reflect these rule changes.

## C. PIPELINES AND THE ENERGY TRANSITION

The Ontario Energy Board (OEB) considered the energy transition in the context of a rebasing application submitted by Enbridge in 2022. In its 21 December 2023 decision, OEB held that “Enbridge Gas [had] not provided an adequate assessment of the risk” that its assets may become stranded as part of the energy transition for the purpose of “[demonstrating] that its capital spending plan is prudent.”<sup>192</sup> To ensure stranded asset risk was appropriately addressed, OEB directed Enbridge to assess several risk mitigation measures, including opportunities to extend the life of its existing assets and whether it could “prune” its existing system to avoid asset replacements.<sup>193</sup> “OEB also determined that ... the revenue horizon that Enbridge Gas [must use] to determine the economic feasibility” of small volume customer connections is zero, to account for stranded asset risk<sup>194</sup> and ensure the correct price signals are sent to residential and other developers.<sup>195</sup>

The British Columbia Utilities Commission (BCUC) also considered the importance of the energy transition in its decision to deny FortisBC Energy Inc.’s (Fortis) application for

<sup>183</sup> Alberta Energy Regulator, Bulletin, 2023-38, “Temporary Pause on New Pipeline Applications” (31 October 2023), online: [perma.cc/YQ6F-TC4H].

<sup>184</sup> Alta Reg 125/2023.

<sup>185</sup> Alberta Energy Regulator, Bulletin, 2023-40, “Release of the New *Pipeline Rules* and Associated Instruments” (15 November 2023), online: [perma.cc/U9W2-D8P9].

<sup>186</sup> *Ibid* at 1–2.

<sup>187</sup> Alberta Energy Regulator, Bulletin, 2015-34, “Confirmation of the Transfer of Pipeline Records to Be Added to the Licence Transfer Application” (17 December 2015), online: [perma.cc/35UR-ABV6]; *Pipeline Rules*, *supra* note 184, s 13.

<sup>188</sup> Alberta Energy Regulator, *Pipelines: Requirements and Reference Tools*, Directive 077 (AER, 15 November 2023), online: [perma.cc/LS3A-QEA8].

<sup>189</sup> Alberta Energy Regulator, *Energy Development Applications and Schedules*, Directive 056 (AER, 8 February 2024), online: [perma.cc/CKL7-67EU].

<sup>190</sup> Alberta Energy Regulator, *Pipeline Inspections*, Manual 005 (Calgary: AER, May 2024), online: [perma.cc/YT5Q-WP5K].

<sup>191</sup> Alberta Energy Regulator, *Energy Development Applications; Procedures and Schedules*, Manual 012 (Calgary: AER, March 2024), online: [perma.cc/G8KE-3NN8].

<sup>192</sup> *Enbridge Gas Inc* (21 December 2023), EB-2022-0200 at 2, online: Ontario Energy Board [perma.cc/M47N-YJ9X].

<sup>193</sup> *Ibid* at 2.

<sup>194</sup> *Ibid* at 2, 41.

<sup>195</sup> *Ibid* at 39–42.



the Okanagan Capacity Upgrade Project.<sup>196</sup> Fortis requested a certificate of public convenience and necessity to upgrade its Interior Transmission System to meet a forecasted increase in peak natural gas demand throughout the central and north Okanagan regions over the next 20 years.<sup>197</sup> BCUC noted that Fortis had not considered the possibility that natural gas demand could flatten or decrease over the next 20 years due to British Columbia's decarbonization and energy transition related policies and commitments.<sup>198</sup> Having regard to the estimated project cost of \$327 million, BCUC determined that approval of the project was not prudent and directed Fortis to examine short-term solutions for addressing its forecasted demand increase.<sup>199</sup>

Together, these decisions indicate that regulators may consider the anticipated decline in fossil fuel based energy consumption associated with the energy transition and government decarbonization policies when reviewing natural gas pipeline facility and rate applications. Energy lawyers may see such applications pre-emptively address energy transition risks going forward.

## VII. INDIGENOUS LAW

### A. UNDRIP ACTION PLAN

The *United Nations Declaration on the Rights of Indigenous Peoples Act*<sup>200</sup> requires the federal government to ensure the laws of Canada are consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*.<sup>201</sup> Similar to legislation established in British Columbia,<sup>202</sup> the legislation requires the federal government to prepare an action plan identifying how it will implement the rights and principles set out in *UNDRIP* in consultation and cooperation with Indigenous peoples.<sup>203</sup> On 21 June 2023, the Government of Canada unveiled its *UNDRIP* Action Plan comprised of 181 guiding measures spanning the 2023 to 2028 period.<sup>204</sup> Implementation measures proposed under the *UNDRIP* Action Plan are categorized according to policy priorities considered to be shared among the Government of Canada, First Nations, Inuit, and Métis, as well as priorities considered to be distinct to each of these communities and Indigenous peoples who entered into modern treaties.

### B. NEBC CONNECTOR PROJECT

On 28 December 2023, CER issued a certificate of public convenience and necessity to NorthRiver Midstream Inc. (via its wholly owned subsidiary NorthRiver Midstream

---

<sup>196</sup> *FortisBC Energy Inc* (22 December 2023), G-361-23, online: British Columbia Utilities Commission [perma.cc/U5CN-UBRB].

<sup>197</sup> *Ibid* at 1.

<sup>198</sup> *Ibid* at 24.

<sup>199</sup> *Ibid* at 24–25.

<sup>200</sup> SC 2021, c 14 [*UNDRIP Act*].

<sup>201</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/61/53 (2007) [*UNDRIP*].

<sup>202</sup> *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

<sup>203</sup> *UNDRIP Act*, *supra* note 200, s 6.

<sup>204</sup> Department of Justice Canada, *The United Nations Declaration on the Rights of Indigenous Peoples Act: Action Plan* (Ottawa: DOJC, 21 June 2023).

NEBC Connector GP Inc.)<sup>205</sup> in respect of its NEBC Connector Project (the Project).<sup>206</sup> The Project consists of two parallel 215-kilometer condensate and natural gas liquids pipelines.<sup>207</sup> It will provide an alternative transportation option for condensate and natural gas liquids producers in northeast British Columbia by connecting them to Alberta.<sup>208</sup> The Project was proposed just months after the *Yahey v. British Columbia* decision, in which the Supreme Court of British Columbia declared (among other things) that the Province may not continue to authorize activities that unjustifiably infringe Treaty 8 rights of the Blueberry River First Nation (BRFN).<sup>209</sup> The Project is located within Treaty 8 and traverses the BRFN Claim Area. CER found that the Supreme Court of British Columbia's declarations in *Yahey* applied to the provincial Crown and were not binding on it.<sup>210</sup> However, CER recognized that *Yahey* has important implications for Treaty rights and cumulative effects that were relevant to its hearing process and its substantive assessment of the Project application. Thorough engagement with Indigenous peoples occurred throughout the hearing process, which included opportunities for participant funding, "a process workshop, three rounds of [information requests] ... and a technical workshop on cumulative effects assessment" prior to the completeness determination, as well as project-specific information requirements, the presentation of oral Indigenous knowledge, multi-day workshops, and a process for intervener comments on proposed approval conditions.<sup>211</sup> CER ultimately recommended approval of the Project subject to 49 conditions which address environmental effects and safeguard Indigenous and Treaty rights.<sup>212</sup> Indeed, the incorporation of Indigenous knowledge and engagement with potentially affected Indigenous groups is a key feature of many approval conditions.<sup>213</sup> While the geographic and temporal context of the Project necessitated a unique approach, similar procedural steps may be applied in future CER hearings where Treaty rights are engaged or cumulative effects are at issue.

### C. CUMULATIVE EFFECTS MANAGEMENT AT THE BCER

BCER and BRFN have co-developed a consultation process to ensure applications for energy activities in the BRFN Claim Area are being managed in a manner that is consistent with the *Blueberry River First Nations Implementation Agreement*<sup>214</sup> and that appropriate pre-application engagement with the BRFN has occurred.<sup>215</sup> As of 30 June 2023, applicants for BCER authorizations are required to determine if proposed energy resource activities

<sup>205</sup> Canada Energy Regulator, *Certificate OC-067*, File 3429412 (Calgary: CER, 28 December 2023), online: [perma.cc/DV9R-C75J].

<sup>206</sup> *Commission of the Canada Energy Regulator Report: NorthRiver Midstream NEBC Connector GP Inc.*, OH-001-2022 (Calgary: CER, 18 October 2023), online: [perma.cc/F9VJ-S8JV] [*CER Report: NorthRiver*].

<sup>207</sup> *Ibid* at 2.

<sup>208</sup> *Ibid*.

<sup>209</sup> *Yahey v British Columbia*, 2021 BCSC 1287 [*Yahey*].

<sup>210</sup> *CER Report: NorthRiver*, *supra* note 206 at 3.

<sup>211</sup> *Ibid* at 42–55.

<sup>212</sup> *Ibid* at 1, 61.

<sup>213</sup> Canada Energy Regulator, News Release, "Commission of the CER Recommends Approval for the NEBC Connector Project With 49 Conditions" (18 October 2023), online: [perma.cc/E2TL-N36J].

<sup>214</sup> 18 January 2023, online: [perma.cc/2AGV-GSSV].

<sup>215</sup> British Columbia Energy Regulator, Information Update, "BCER and BRFN Have Worked Together to Develop a New Consultation Process" (30 June 2023), online: [perma.cc/XL7U-2839].

overlap with the BRFN's consultation boundary and complete a prescribed BRFN Implementation Agreement Form if such overlap occurs.<sup>216</sup> Separately, the BCER and Treaty 8 First Nations have co-developed *Treaty 8 Planning and Mitigation Measures* outlining specific planning requirements and operational practices for energy resource activities that occur in Treaty 8 Territory.<sup>217</sup> Effective 15 April 2024, BCER applicants proposing development in this area will be required to incorporate these planning and mitigation measures into their application materials and implement the measures throughout project construction and operation.<sup>218</sup> The BCER has also advised industry of anticipated changes that will impact Treaty 8 consultation processes, including enhanced guidance for Nation-specific pre-engagement practices and process timelines, as well as a shift to notification-level consultation for low to no impact application types.<sup>219</sup>

### VIII. ENVIRONMENTAL LAW

The federal government continues to implement legislative changes to facilitate its commitments relating to environmental matters. It has made substantial amendments to *CEPA* for the first time since its enactment in 1999, including the codification of the right to a healthy environment, and will adjust the impact assessment regime in response to the Supreme Court of Canada's October 2023 decision confirming that the "designated project" aspects of the regime are unconstitutional.<sup>220</sup> This section highlights these recent and forthcoming legislative amendments and provides an overview of Alberta Environment and Protected Area's (AEPA) first prosecution of a third party assurance provider under Alberta's industrial carbon pricing and emissions trading regime.

#### A. THE REFERENCE RE IMPACT ASSESSMENT ACT DECISION AND PROPOSED AMENDMENTS

On 13 October 2023, the Supreme Court issued its decision in *Reference re Impact Assessment Act*.<sup>221</sup> This significant reference decision considered the submissions of Attorneys General from almost every province, as well as project proponents, Indigenous groups, and environmental groups. The majority of the Supreme Court found that the designated projects scheme established by the *Impact Assessment Act*<sup>222</sup> is unconstitutional.<sup>223</sup> The scheme is not directed at regulating environmental "effects within federal jurisdiction" in practice because such effects do not drive the scheme's decision-making functions, and the definition of that term is too broad to properly align with federal

---

<sup>216</sup> *Ibid.*

<sup>217</sup> British Columbia Energy Regulator, *Treaty 8 Planning and Mitigation Measures*, version 1.1 (BCER, 15 January 2024), online: [perma.cc/DAP9-GF3U].

<sup>218</sup> British Columbia Energy Regulator, Information Update, "New Planning and Mitigation Measures for Energy Resource Activities in Treaty 8 Territory (IU 2024-01)" (15 January 2024), online: [perma.cc/CYJ2-VR87].

<sup>219</sup> British Columbia Energy Regulator, "Upcoming Shifts to the BCER's Consultation Processes" (29 April 2024) via e-mail [communicated to author].

<sup>220</sup> Environment and Climate Change Canada, "Bill S-5: *Strengthening Environmental Protection for a Healthier Canada Act*," online: [perma.cc/8346-VABB]; Impact Assessment Agency of Canada, "Statement of the Interim Administration of the *Impact Assessment Act* Pending Legislative Amendments," online: [perma.cc/U6EV-WXVY].

<sup>221</sup> *IAA Reference*, *supra* note 15.

<sup>222</sup> SC 2019, c 28, s 1 [*IAA*].

<sup>223</sup> *IAA Reference*, *supra* note 15 at para 215.

legislative jurisdiction.<sup>224</sup> As a result, the designated project scheme unconstitutionally extends federal decision-making authority to projects that would otherwise be regulated at the provincial level.

The federal government accepted the Supreme Court's decision and issued guidance on 26 October 2023 regarding how the *IAA* will be administered pending legislative amendments (Interim Guidance).<sup>225</sup> The Interim Guidance confirms that the Minister's discretionary authority to designate projects has been paused, and that consideration of any new designation requests will only resume, as appropriate (if at all), once amended legislation is in force. While the stated intention of the Interim Guidance was to provide certainty for proponents of projects currently undergoing *IAA* review, it has been criticized for creating confusion.

On 30 April 2024, the Government of Canada introduced *IAA* amendments to address the Supreme Court's decision via *Budget Implementation Act, 2024, No. 1*.<sup>226</sup> The proposed amendments replace the current definition of "effects within federal jurisdiction" with the narrower term "adverse effects within federal jurisdiction."<sup>227</sup> This term narrows the scope of effects that may be considered a "non-negligible adverse change" to matters that fall within the legislative authority of Parliament such as fish and fish habitat, migratory birds, and changes to the environment that directly impact Indigenous Peoples.<sup>228</sup> The proposed amendments also clarify that the potential for non-negligible adverse effects within federal jurisdiction must exist in order for the Minister to designate a project as reviewable or for the Impact Assessment Agency to require an impact assessment as part of its screening decision.<sup>229</sup> In both cases, other factors may be considered when deciding whether designation or impact assessment is warranted, including whether other existing federal or provincial processes could address the potential adverse federal effects.<sup>230</sup> Indeed, the proposed amendments seek to promote inter-jurisdictional cooperation by permitting the substitution of a federal impact assessment, in whole or in part, with equivalent assessment processes from another jurisdiction. That jurisdiction will retain final decision-making authority for the portions of the assessment for which it is responsible.<sup>231</sup> The proposed amendments also clarify the public interest test that is applied when determining whether to allow a designated project to proceed, subject to conditions or otherwise. The current legislation requires consideration of numerous equally weighted factors, some of which are outside federal jurisdiction, when assessing whether adverse effects are in the public interest.<sup>232</sup> The proposed amendments require an initial determination as to whether significant adverse federal effects are likely. If so, the decision-maker will determine if such effects are justified in the public interest having regard to listed factors including, among other things, the extent to which the effects contribute to the Government of

---

<sup>224</sup> *Ibid* at para 6.

<sup>225</sup> Impact Assessment Agency of Canada, News Release, "Government of Canada Releases Interim Guidance on the Impact Assessment Act" (26 October 2023), online: [perma.cc/6CT5-848J].

<sup>226</sup> SC 2024, c 17 [*BIA*].

<sup>227</sup> Impact Assessment Agency of Canada, "Proposed Amendments to the *Impact Assessment Act*" (2 May 2024), online: [perma.cc/5FAY-NYHR].

<sup>228</sup> *BIA*, *supra* note 226, s 271(3).

<sup>229</sup> *Ibid*, s 271(3)(a).

<sup>230</sup> *Ibid*, ss 275, 277.

<sup>231</sup> *Ibid*, ss 280–82, 285.

<sup>232</sup> *IAA Reference*, *supra* note 15 at 167.

Canada's ability to meet its environmental obligations and climate change commitments.<sup>233</sup> See Bradley Gilmour and colleagues' article for a more detailed discussion and analysis of the proposed *IAA* amendments.<sup>234</sup>

## B. UPDATES TO THE *CANADIAN ENVIRONMENTAL PROTECTION ACT*

The *Strengthening Environmental Protection for a Healthier Canada Act* received royal assent on 13 June 2023, implementing the first set of significant amendments to the *CEPA* legislative scheme since 1999.<sup>235</sup> Key amendments include expanded information gathering powers for the government in the context of toxic or polluting substances, including the power to compel information on substances or activities that may contribute to pollution.<sup>236</sup> Hydraulic fracturing and tailings ponds are specifically identified as activities about which information may be requested.<sup>237</sup> Amendments will also require the federal government to establish a new plan for chemicals management priorities, and to report annually on its progress assessing the chemicals and substances identified in that plan.<sup>238</sup> The plan must consider whether there is a vulnerable population or environment in relation to the substance, and whether exposure to the substance in combination with other substances may have cumulative effects.<sup>239</sup> None of these concepts existed in the prior version of the legislation and could have significant bearing on the energy industry, including as potential bases for litigation by or on behalf of vulnerable populations. Following the amendments, *CEPA* also includes a mechanism pursuant to which Canadians can request that a chemical be assessed for inclusion in Schedule 1.<sup>240</sup> Such a request was filed in March 2024 by the Athabasca Chipewyan First Nation, the Mikisew Cree First Nation, and environmental organizations in respect of naphthenic acids present in oil sands processed water.<sup>241</sup>

*CEPA*'s preamble now confirms the government's commitment to implementing *UNDRIP* and recognizing the role that Indigenous knowledge plays in environmental decision-making.<sup>242</sup> It also includes a declaration that "every individual in Canada has a right to a healthy environment."<sup>243</sup> *CEPA*'s recognition of a right to a healthy environment has attracted significant attention, but it remains unclear how that right will be defined or enforced. Section 2(1) of *CEPA* states that the government shall protect the right to a healthy environment "as provided under this Act, subject to any reasonable limits."<sup>244</sup>

---

<sup>233</sup> *BIA*, *supra* note 226, ss 289–91.

<sup>234</sup> Bradley Gilmour et al, "From 'Guidelines Order' to 'Impact Assessment' The Evolution of Federal Environmental Assessment Legislation in Canada" (2024) 62:2 *Alta L Rev* 368.

<sup>235</sup> SC 2023, c 12.

<sup>236</sup> *Ibid*, s 46.

<sup>237</sup> *CEPA*, *supra* note 17, s 46.

<sup>238</sup> *Ibid*, ss 73–74.

<sup>239</sup> *Ibid*, ss 68(a)(iii.1)–(iii.2).

<sup>240</sup> *Ibid*, s 76.

<sup>241</sup> Letter from Bronwyn Roe, Anna McIntosh & Elaine MacDonald to Steven Guilbeault (11 March 2024), online: [perma.cc/53SX-YWK6] (the request notes that Environment and Climate Change Canada's recent assessment of the "commercial naphthenic acids group" excluded naphthenic acids present in oil sands processed water, at 1).

<sup>242</sup> *CEPA*, *supra* note 17, Preamble.

<sup>243</sup> *Ibid*, Preamble, s 2(1)(a.2).

<sup>244</sup> *Ibid*.

While the government is required to develop an implementation framework by June 2025 setting out how the right to a healthy environment will be considered when administering *CEPA*, the definition of “reasonable limits” will ultimately be left to the discretion of relevant decision-makers and judicial interpretation. In addition, *CEPA* does not identify how alleged violations of the right to a healthy environment would be addressed. Consultations regarding the implementation framework are ongoing.

### C. AÉPA LAYS CHARGES UNDER THE *EMISSIONS MANAGEMENT AND CLIMATE RESILIENCE ACT*

Alberta’s industrial carbon pricing and emissions trading regime is implemented pursuant to the *Technology Innovation and Emissions Reduction Regulation*.<sup>245</sup> *TIER* is enacted under the *Emissions Management and Climate Resilience Act*<sup>246</sup> which, among other things, makes it an offence to provide false or misleading information under *TIER*.<sup>247</sup> Pursuant to *TIER*, regulated facilities must submit annual compliance reports outlining how they have satisfied their emission reduction requirements.<sup>248</sup> Reductions can be achieved through direct emission reductions, a payment into the *TIER* Fund, or through the submission of *TIER*-generated credits, including emission offsets, emission performance credits, and sequestration credits.<sup>249</sup> Compliance reports and *TIER*-generated credits must be verified by an accredited third party assurance provider<sup>250</sup> and the associated verification reports must be peer reviewed in accordance with *TIER*<sup>251</sup> and the *Standard for Validation, Verification, and Audit*.<sup>252</sup>

In May 2023, AÉPA laid 25 charges against Alberta-based environmental services company, Amberg Corp., and one of its employees, Olga Kiiker, for performing the functions of a third party assurance provider without the requisite qualifications, failing to comply with the requirements of the *Standard for Validation, Verification, and Audit*, and for knowingly providing false or misleading information.<sup>253</sup> Kiiker pled guilty to knowingly providing false or misleading information in November 2023. She received a \$10,000 fine, is prohibited from working in roles that relate to GHG reporting for three years, and was required to prepare an article for publication in the Environmental Services Association of Alberta Weekly News outlining her experience.<sup>254</sup> The article and agreed statement of facts explain that the only Amberg Corp. employee qualified to complete peer reviews had left the company in December 2020 and no replacement was found.<sup>255</sup> Kiiker used the former employee’s electronic signature and posed as them in emails and peer

<sup>245</sup> Alta Reg 133/2019 [*TIER*].

<sup>246</sup> SA 2003, c E-7.8 [*EMCRA*].

<sup>247</sup> *Ibid*, s 44.

<sup>248</sup> *TIER*, *supra* note 245, s 15.

<sup>249</sup> *Ibid*, s 13.

<sup>250</sup> *Ibid*, s 27.

<sup>251</sup> *Ibid*, ss 15(4)(e), 15(6), 18(2), 18(3), 26(3).

<sup>252</sup> Alberta Environment and Protected Areas, *Standard for Validation, Verification, and Audit*, version 5.2 (Edmonton: AÉPA, 30 January 2023).

<sup>253</sup> Government of Alberta, *Information on Behalf of His Majesty The King*, regarding Amberg Corp. and Olga Kiiker (Calgary: Environment and Protected Areas, 3 May 2023).

<sup>254</sup> *R v Olga Kiiker* (21 November 2023), Calgary 230422073P1 (ABCJ) (Agreed Statement of Facts), online: [perma.cc/K4KB-ZJXX].

<sup>255</sup> *R v Olga Kiiker* (21 November 2023), Calgary 230422073P1 (ABCJ) (Order Pursuant to Section 51(1) of the *Emissions Management and Climate Resilience Act*), online: [perma.cc/TE2H-MB6Q].

review documents with a view to retaining clients. While the charges against Amberg Corp. were ultimately withdrawn by the Crown,<sup>256</sup> the potential penalties associated with the charges were significant. Twenty-four of the 25 charges faced by the corporation carried a penalty of up to \$500,000, and the final charge carried a penalty of up to \$1 million.<sup>257</sup>

This was the first time AEPA has laid charges against a third party assurance provider under the *Emissions Management and Climate Resilience Act* and *TIER*, and was among the most significant enforcement actions taken pursuant to the legislation. AEPA's enforcement action is indicative of how important the integrity of the third party assurance and verification process is to maintaining *TIER*'s reputation as a transparent and reliable emissions trading system and to safeguarding the value of *TIER*-generated credits.

## IX. CONCLUSION

The past year brought notable legislative and regulatory changes important to the practice of energy law in Canada. Many of these developments, particularly those which took place between April 2023 and early May 2024, have been summarized in this article. In particular, this article has provided an overview of federal climate change and decarbonization initiatives that have and will continue to shape the future of oil and gas and renewable energy developments, as well as sector-specific legislative and regulatory changes in areas such as CCUS, electricity generation and transmission, mineral resource development, pipelines, and oil and gas. Several legislative and regulatory developments of interest to energy lawyers have occurred since this article was completed in early May 2024, and the authors look forward to following these developments in the year ahead.

---

<sup>256</sup> Government of Alberta, "Environmental Compliance Prosecutions: Concluded Files" (9 May 2024), online: [perma.cc/9PR7-84FT].

<sup>257</sup> *EMCRA*, *supra* note 246, s 45; *TIER*, *supra* note 245, s 34.