

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

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TABLE OF CONTENTS

1. Introduction	2
2. Climate Change and Decarbonization	2
A. 2023 Progress Report on Federal 2030 Emissions Reduction Plan	3
B. Federal Framework for Oil and Gas Sector Emissions Cap	4
C. Proposed Amendments to Federal Methane Regulations	5
D. Federal <i>Clean Fuel Regulations</i>	6
E. Federal <i>Clean Electricity Regulations</i>	6
F. Provincial Responses to Federal Decarbonization Initiatives	7
G. Carbon Capture, Utilization and Storage	9
3. Power	10
A. Renewables	11
B. Nuclear	12
C. Energy Storage	14
D. Electricity Market Design	15
E. Transmission	15
F. Interties	16
G. Distribution	18
4. Critical Minerals	19
A. Federal Funding	19
B. <i>Alberta Mineral Resources Development Act</i>	20
C. Saskatchewan Helium and Brine Mineral Tenure	21
5. Oil and Gas	21
A. British Columbia Liability Management Framework Updates	21
B. Alberta Liability Management Framework Updates	22
C. AlphaBow Energy Ltd. Regulatory Appeals	25
6. Pipelines	28
A. Trans Mountain Pipeline Expansion Interim Toll	29
B. Updated Alberta <i>Pipeline Rules</i>	30

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C.	Pipelines and the Energy Transition	30
7.	Indigenous Law.....	31
A.	UNDRIP Action Plan.....	31
B.	NEBC Connector Project.....	32
C.	Cumulative Effects Management at the BCER	33
8.	Environmental Law	34
A.	The <i>Reference re Impact Assessment Act</i> Decision and Proposed Amendments	35
B.	Updates to the <i>Canadian Environmental Protection Act</i>	37
C.	AEPA lays charges under the <i>Emissions Management and Climate Resilience Act</i>	38

1. INTRODUCTION

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, 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 (**CCUS**), 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.

2. CLIMATE CHANGE AND DECARBONIZATION

Canada is set to surpass its international decarbonization targets based on current policies. Notwithstanding, 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. Despite this turmoil, both levels of government are continuing to encourage investment and innovation in clean technology and decarbonization initiatives including CCUS, renewable power generation and nuclear power generation.

A. 2023 Progress Report on Federal 2030 Emissions Reduction Plan

On December 7, 2023, the Government of Canada released the “2023 Progress Report on the 2030 Emissions Reduction Plan”.¹ This is the first of three progress reports required under the *Canadian Net-Zero Emissions Accountability Act*,² 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.³ The *2030 ERP* outlines Canada’s target of reaching 40 percent below 2005 national emissions levels by 2030, and its interim target of 20 percent below 2005 levels by 2026. According to the report, Canada is on pace to surpass both its 2026 interim objective and 2030 target based on the current emissions trajectory and implementation status for each of the key measures and strategies outlined in the *2030 ERP*. In a news release accompanying the progress report,⁴ 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, as well as the federal Green Buildings Strategy and plans for the marine, rail and aviation sectors.

¹ Environment and Climate Change Canada, *2023 Progress Report on the 2030 Emissions Reduction Plan* (Gatineau: ECCC, 2023).

² *Canadian Net-Zero Emissions Accountability Act*, SC 2021, c 22.

³ Environment and Climate Change Canada, *2030 Emissions Reduction Plan: Canada’s Next Steps for Clean Air and a Strong Economy* (Gatineau: ECCC, 2022) [2030 ERP].

⁴ ECCC, News Release, “First Progress Report on the 2030 Emissions Reduction Plan shows Canada bending the curve on greenhouse gas emissions” (7 December 2023), online: <<https://www.canada.ca/en/environment-climate-change/news/2023/12/first-progress-report-on-the-2030-emissions-reduction-plan-shows-canada-bending-the-curve-on-greenhouse-gas-emissions.html>>.

B. Federal Framework for Oil and Gas Sector Emissions Cap

On December 7, 2023, the Government of Canada introduced its draft of the *Regulatory Framework for an Oil and Gas Sector Greenhouse Gas Emissions Cap*⁵ pursuant to which oil and gas sector emissions would be capped at 106 to 112 megatons per year by 2030. 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. Covered facilities would 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. 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. The national emissions cap is a key commitment in the *2030 ERP*⁶ and has been designed to take other targets into account, 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 26th United Nations Climate Change Conference held in 2021, the development and release of draft regulations has been slowed in part due to the Supreme Court of Canada (**SCC**) ruling on the *Impact Assessment Act*⁷ and Federal Court ruling on plastics⁸ 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 (CEPA)*⁹ are currently anticipated in mid-2024 with implementation slated for 2025.

⁵ Environment and Climate Change Canada, *A Regulatory Framework To Cap Oil and Gas Sector Greenhouse Gas Emissions* (Gatineau: ECCC, 2023).

⁶ 2030 ERP, *supra* note 3 at 50.

⁷ Reference re *Impact Assessment Act*, 2023 SCC 23 [IAA].

⁸ *Canada (Attorney General) v Responsible Plastic Use Coalition*, 2024 FCA 18.

⁹ *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 [CEPA].

C. Proposed Amendments to Federal Methane Regulations

On December 16, 2023, the federal government released proposed *Regulations Amending the Regulations Respecting Reduction in the Release of Methane and Certain Volatile Organic Compounds (Upstream Oil and Gas Sector)*¹⁰ to facilitate Canada's commitment to a 75 percent reduction in oil and gas sector methane emissions below 2012 levels by 2030 through regulatory and performance-based approaches. 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 to 45 percent below 2012 levels by 2025.¹¹ In addition to enhanced reduction targets, the proposed amendments introduce an annual third-party inspection requirement¹² and include a performance-based option as an alternative pathway for compliance.¹³ 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 approach, prescribing methane emission standards for specific equipment and sites. The proposed amendments would begin to take effect in 2027 in respect of emission inspection programs and investments in new production, with full sector compliance by 2030. This phased implementation approach is intended to spread compliance costs over multiple years and allow late life-cycle production sites to avoid new capital investments.¹⁴

¹⁰*Regulations Amending the Regulations Respecting Reduction in the Release of Methane and Certain Volatile Organic Compounds (Upstream Oil and Gas Sector)*, C Gaz I, 4022 (Draft) [*Methane Regulations Amendment*].

¹¹ *Regulations Respecting Reduction in the Release of Methane and Certain Volatile Organic Compounds (Upstream Oil and Gas Sector)*, SOR/2018-66 [*Methane Regulations*].

¹² *Methane Regulations Amendment*, *supra* note 10, ss 8.13 and 53.2.

¹³ 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.

¹⁴ *Methane Regulations Amendment*, *supra* note 10, at 3976 – 3977.

D. Federal Clean Fuel Regulations

While certain aspects of the *Clean Fuel Regulations*¹⁵ have been in force since June 2022, the obligation for producers and importers of gasoline and diesel to achieve prescribed carbon intensity (**CI**) reduction requirements did not come into force until July 1, 2023. The first compliance period under the *CFR* ran from July 2023 to December 2023 with applicable CI limits of 91.5 grams of carbon dioxide equivalent per megajoule of energy (**gCO₂e/MJ**) for gasoline and 89.5 gCO₂e/MJ for diesel.¹⁶ Regulated parties that may owe compliance credits for this period will have 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. During a technical briefing on June 30, 2023,¹⁷ 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. The *CFR* were modelled in part on existing and proposed low-carbon fuel regulations and standards in other jurisdictions, such as the Low Carbon Fuel Standard in British Columbia.¹⁸

E. Federal Clean Electricity Regulations

Canada unveiled draft *Clean Electricity Regulations*¹⁹ on August 10, 2023, setting forth stringent average annual emissions intensity performance standards aimed at achieving net-zero GHG emissions from the electricity sector by 2050. The regulations would impose emissions

¹⁵ *Clean Fuel Regulations*, SOR/2022-140 [*CFR*].

¹⁶ *Ibid*, s 5(1).

¹⁷ Environment and Climate Change Canada, *Clean Fuel Regulations: Recap of June 2023 media technical briefing (Statement)* (Gatineau: ECCC, 30 June 2023), online: <<https://www.canada.ca/en/environment-climate-change/news/2023/06/clean-fuel-regulations-recap-of-june-2023-media-technical-briefing.html>>

¹⁸ The British Columbia Low Carbon Fuel Standard (**LCFS**) has been in place since 2010. Effective January 1, 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 2022, c 21 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).

¹⁹ *Clean Electricity Regulations*, C Gaz I, 2709 (Draft) [*Clean Electricity Regulations*].

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 (**CO₂e/GWh**) starting in 2035 (**Performance Standard**).²⁰ After receiving public comments on the draft regulations, ECCC issued a comprehensive “What We Heard” Report on February 16, 2024,²¹ 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 the application of emission standards 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 25MW 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. Comments on these proposed changes closed on March 15, 2024, with the final version of the *Clean Electricity Regulations* expected to be released later this year.

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

²⁰ *Ibid.*

²¹ 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), online: <<https://www.canada.ca/content/dam/eccc/documents/pdf/climate-change/clean-fuel/electricity/clean-electricity-regulations-public-update-16022024.pdf>>

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.²² 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*²³ and *Clean Electricity Regulations*. Prior to the Prime Minister's announcement, both provinces had enacted provincial sovereignty legislation aimed at combatting federal decarbonization initiatives impacting the oil and gas and electricity sectors. This includes the *Alberta Sovereignty within a United Canada Act*²⁴ in force since December 15, 2022, and *The Saskatchewan First Act*,²⁵ which was assented to on April 6, 2023.

Both the *Sovereignty Act* and the *SFA* were invoked for the first time in November 2023 in response to the draft *Clean Electricity Regulations*. Following a technical submission prepared by the Government of Alberta concerning the draft regulations,²⁶ Premier Danielle Smith introduced a motion in Alberta's legislative assembly on November 28, 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.²⁷ On the same day, Saskatchewan announced that the *Clean Electricity Regulations* would be referred to the Economic Impact

²² Department of Finance Canada, News Release, "Lowering energy bills for Canadians across the country" (3 November 2023).

²³ *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 [GGPPA].

²⁴ *Alberta Sovereignty Within a United Canada Act*, SA 2022, c A-33.8 [Sovereignty Act].

²⁵ *The Saskatchewan First Act*, SS 2023, c 9 [SFA].

²⁶ Government of Alberta, *Federal Draft Clean Electricity Regulations Government of Alberta Technical Submission* (Alberta Environment and Protected Areas, 2023): online: <<https://www.alberta.ca/system/files/epa-government-of-alberta-submission-on-draft-federal-electricity-regulations.pdf>>.

²⁷ Alberta, Legislative Assembly, *Alberta Hansard* (28 November 2023) at 389.

Assessment Tribunal created under the *SFA*, and forecasted that future referrals for assessment of federal regulations relating to the oil and gas emissions cap and fuel standard could also be anticipated.²⁸ On December 6, 2023, Saskatchewan passed *The SaskEnergy (Carbon Tax Fairness for Families) Amendment Act*²⁹ which amends *The SaskEnergy Act*³⁰ to designate the provincial Crown as the 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 January 1, 2024.³¹

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.

G. Carbon Capture, Utilization and Storage

On November 28, 2023, the Alberta government introduced the Alberta Carbon Capture Incentive Program (**ACCIP**), a new grant offered by the provincial government to incentivize CCUS projects located within the province. The announcement was followed by the federal government's introduction of legislation setting out the previously announced investment tax credit (**ITC**) for CCUS projects. The ACCIP provides a 12 percent grant that can be coupled with the federal ITC to support new CCUS projects in the province of Alberta.³² The Government of Alberta has suggested that these incentives will collectively provide CCUS proponents with a competitive

²⁸ Saskatchewan, Legislative Assembly, *Saskatchewan Hansard* (28 November 2023) at 4821.

²⁹ *The SaskEnergy (Carbon Tax Fairness for Families) Amendment Act*, 2023, SS 2023, c 50.

³⁰ *The SaskEnergy Act*, SS 1992, c S-35.1.

³¹ Saskatchewan, Government Introduces Carbon Tax Fairness for Families Act (News Release) (16 November 2023), online: <<https://www.saskatchewan.ca/government/news-and-media/2023/november/16/government-introduces-carbon-tax-fairness-for-families-act>>.

³² Alberta, Accelerating emissions reductions (News Release) (28 November 2023), online: <<https://www.alberta.ca/release.cfm?xID=89371EBE70B6A-DCCF-436D-38CCDD7DB6458807>>.

advantage in developing CCUS technology and bringing Alberta-based CCUS projects to completion.³³

One such project is the Pathways Alliance CO₂ Transportation Network and Storage Hub. On March 22, 2024, Canadian Natural Resources Limited began filing applications with the Alberta Energy Regulator (**AER**) on behalf of Pathways Alliance for the 400-kilometre CO₂ pipeline that will transport captured carbon dioxide from oil sands facilities to a proposed storage hub near Cold Lake, Alberta.³⁴ 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 in the second quarter of 2024.³⁵ Both sets of applications will be watched closely by energy lawyers across the country.

3. 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.

³³ *Ibid.*

³⁴ Pathways Alliance, Pathways Alliance begins filing regulatory applications for proposed CCS transportation network and storage hub (News Release) (22 March 2024), online: <<https://pathwaysalliance.ca/news/pathways-alliance-begins-filing-regulatory-applications-for-proposed-ccs-transportation-network-and-storage-hub/>>.

³⁵ *Ibid.*

A. Renewables

On August 3, 2023, the Alberta government enacted the *Generation Approvals Pause Regulation*³⁶ prohibiting the Alberta Utilities Commission (**AUC**) from approving new renewable electricity generation projects until February 29, 2024. On the same day, by Order in Council 171/2023,³⁷ 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. The AUC considered the majority of these policy issues in a “Module A” proceeding,³⁸ with the supply and reliability issues addressed in a separate “Module B” proceeding.³⁹ Following receipt of the AUC’s report on Module A, Alberta’s Minister of Affordability and Utilities issued policy guidance to the AUC on February 28, 2024⁴⁰ advising of anticipated policy, 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. The AUC’s Module A report was issued to the public on March 12, 2024⁴¹ and the Module B report was provided to the Minister of Affordability and Utilities on March 28, 2024.⁴²

³⁶ *Generation Approvals Pause Regulation*, Alta Reg 108/2023.

³⁷ Alberta, Order in Council, 171/2023 (2 August 2023) [*Renewables Inquiry*].

³⁸ Alberta Utilities Commission, *AUC inquiry into the ongoing economic, orderly and efficient development of electricity generation in Alberta – Module A Report: AUC Proceeding 28501* (31 January 2024), online: <https://media.www.auc.ab.ca/prd-wp-uploads/regulatory_documents/Reference/28501_Inquiry-ModuleA-Report.pdf> [*Module A Report*].

³⁹ Alberta Utilities Commission, *Notice of AUC inquiry into the ongoing economic, orderly and efficient development of electricity generation in Alberta – AUC inquiry process for Module B: Proceeding 28542* (24 October 2023), online: <<https://efiling-webapi.auc.ab.ca/Document/Get/795151>>.

⁴⁰ Letter from Nathan Neudorf, Alberta Minister of Affordability and Utilities, to Bob Heggie, Chief Executive Officer of the Alberta Utilities Commission (28 February 2024), online: <<https://www.alberta.ca/system/files/au-minister-neudorf-letter-to-auc-20240228.pdf>>.

⁴¹ *Module A Report*, *supra* note 36.

⁴² Alberta Utilities Commission, Letter advising report sent to the Minister of Affordability and Utilities (28 March 2024).

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 December 11, 2023 that the province will be procuring 5,000 megawatts (**MW**) of new generation from wind, solar, hydro and biomass sources over the next five to ten years.⁴³ Nova Scotia also launched the first round of its Green Choice Program to procure 350 MW of new renewable electricity to be operational by 2027.⁴⁴ On April 3, 2024, BC Hydro issued a request for proposals (**RFP**) to procure approximately 3,000 gigawatt hours per year of electricity.⁴⁵ To qualify for BC Hydro's RFP, 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.⁴⁶

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 ITC applicable to small modular reactors (**SMRs**).⁴⁷ Ontario's *Plan for a Clean Energy Future*⁴⁸ emphasizes the refurbishment and expansion of

⁴³ Ontario, Independent Electricity System Operator, Evaluating Procurement Options for Supply Adequacy: A Resource Adequacy Update to the Minister of Energy, (11 December 2023), online: <<https://www.ieso.ca/-/media/Files/IESO/Document-Library/resource-eligibility/Evaluating-Procurement-Options-For-Supply-Adequacy.pdf>>.

⁴⁴ Nova Scotia, News Release, "Green Choice Program for Large-Scale Electricity Customers" (1 December 2023), online: <<https://news.novascotia.ca/en/2023/12/01/green-choice-program-large-scale-electricity-customers#:~:text=the%20Green%20Choice%20Program%20is%20part%20of%20Nova%20Scotia's%20Clean,over%20the%20past%20three%20years>>.

⁴⁵ BC Hydro, 2024 Call for Power (2024), online: <https://www.bchydro.com/work-with-us/selling-clean-energy/2024-call-for-power.html?utm_source=direct&utm_medium=redirect&utm_content=2024callforpower>.

⁴⁶ BC Hydro, BC Hydro Call for Power 2024: Request for Proposals (3 April 2024), online: <<https://www.bchydro.com/content/dam/BCHydro/customer-portal/documents/corporate/independent-power-producers-calls-for-power/independent-power-producers/2024-call-for-power-rfp.pdf>>; for the purposes of the RFP, "Clean or renewable resources" means biomass, biogas, geothermal heat, hydro, solar, ocean, wind or any other prescribed resource.

⁴⁷ Government of Canada, *Legislative proposals relating to the Income Tax Act and the Income Tax Regulations* (4 August 2023), online: <<https://fin.canada.ca/drlég-apl/2023/ita-lir-0823-l-2-eng.html>>, proposed subsection 127.45(1), "clean technology property".

⁴⁸ Ontario, Powering Ontario's Growth: Ontario's Plan for a Clean Energy Future (7 July 2023), online: <<https://www.ontario.ca/files/2023-07/energy-powering-ontarios-growth-report-en-2023-07-07.pdf>>.

traditional nuclear generating facilities⁴⁹ and the development of SMRs as playing an important role in meeting future energy demands in line with the joint strategic SMR plan and inter-provincial Memorandum of Understanding (**MOU**) signed by the governments of Ontario, Saskatchewan, New Brunswick and Alberta in 2022.⁵⁰ 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. Long-term development plans for SMRs are also underway in Alberta,⁵¹ Saskatchewan⁵² and New Brunswick.⁵³ On May 2, 2024, the governments of Saskatchewan and Alberta entered into a new, bilateral MOU 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.⁵⁴ While the

⁴⁹ *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 4800MW expansion at Bruce, which would be the first large scale nuclear build in Ontario since 1993. 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: Government of Ontario, *Ontario Supporting Plan to Refurbish Pickering Nuclear Generating Station* (30 January 2024), online: <<https://news.ontario.ca/en/release/1004128/ontario-supporting-plan-to-refurbish-pickering-nuclear-generating-station>>.

⁵⁰ Governments of Ontario, New Brunswick, Alberta, and Saskatchewan, *A Strategic Plan for the Deployment of Small Modular Reactors* (March 2022), online: <<https://open.alberta.ca/dataset/de9ebaba-81a7-456e-81a2-2c57cb11412e/resource/62319fa5-aa5a-4329-b980-5c85a924c7c7/download/energy-interprovincial-strategic-plan-deployment-of-smrs-2022.pdf>>.

⁵¹ The Capital Power Corp. and Ontario Power Generation partnership was announced in January 2024 (Capital Power, Media Release, "Capital Power and Ontario Power Generation partner to advance new nuclear in Alberta" (January 15, 2024), online: <https://www.capitalpower.com/media/media_releases/capital-power-and-ontario-power-generation-partner-to-advance-new-nuclear-in-alberta/>. 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 (X-energy, Press Release, "'X-energy, TransAlta Partner to Study Development of Advanced Small Nuclear Reactors in Alberta through Emissions Reduction Alberta Award'" (2 April 2024), online: <<https://x-energy.com/media/news-releases/x-energy-transalta-partner-to-study-deployment-of-advanced-small-modular-nuclear-reactors-in-alberta-through-emissions-reduction-alberta-award>>).

⁵² 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, *SaskPower and GE Hitachi Sign Agreement to Advance Small Modular Reactor Development* (30 January 2024), online: <<https://www.saskpower.com/about-us/media-information/news-releases/2024/SaskPower-and-GE-Hitachi-sign-agreement-to-advance-SMR-development>>; SaskPower, *Planning for Nuclear: Potential Facility Location*, online: <<https://www.saskpower.com/Our-Power-Future/Infrastructure-Projects/Construction-Projects/Planning-and-Construction-Projects/Planning-for-Nuclear-Power/Potential-Facility-Location>>.

⁵³ On June 30, 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. NB Power, *Advanced Small Modular Reactors*, online: <<https://www.nbpower.com/en/about-us/projects/advanced-small-modular-reactors/>>.

⁵⁴ Government of Saskatchewan, "Saskatchewan and Alberta Partner to Advance Nuclear Power Generation" (2 May 2024), online: <<https://www.saskatchewan.ca/government/news-and-media/2024/may/02/smr-mou-signing-with-alberta>>.

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 2023.⁵⁵ 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.⁵⁶

C. Energy Storage

On March 6, 2024, the Alberta government proclaimed the *Electricity Statutes (Modernizing Alberta's Electricity Grid) Amendment Act, 2022*.⁵⁷ Concurrently, AUC Bulletin 2024-04⁵⁸ announced the coming into force of the updated *Hydro and Electric Energy Regulation*.⁵⁹ The updated *HEER* introduces a process for energy storage facility applications and modifies the approval processes for alterations of existing facilities and connection applications. The updates generally reduce reporting and application requirements and support energy storage and self-supply and export. 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.

⁵⁵ Canadian Nuclear Safety Commission, Record of Decision DEC 22-H7 dated January 8, 2024.

⁵⁶ Sam Konnert, "Community groups file for judicial review over Chalk River nuclear waste facility" CBC News (28 March 2024), online: <<https://www.cbc.ca/news/canada/ottawa/community-groups-file-for-judicial-review-over-chalk-river-nuclear-waste-facility-1.7157502>>.

⁵⁷ *Electricity Statutes (Modernizing Alberta's Electricity Grid) Amendment Act, 2022*, SA 2022, c 8 [ESSA].

⁵⁸ Alberta Utilities Commission, Bulletin 2024-04, "AUC updates to the Hydro and Electric Energy Regulation" (6 March 2024), online: <https://media.www.auc.ab.ca/prd-wp-uploads/News/2024/Bulletin_2024-04.pdf> [Bulletin 2024-04]; Alberta Utilities Commission, Commission Order 2024-001, (4 March 2024), online: <https://media.www.auc.ab.ca/prd-wp-uploads/regulatory_documents/Reference/CommissionOrder2024-001.pdf>.

⁵⁹ *Hydro and Electric Energy Regulation*, Alta Reg 409/1983 [HEER].

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**)⁶⁰ and Market Surveillance Administrator (**MSA**)⁶¹ released on March 11, 2024⁶² 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 the 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*⁶³ set to expire on November 30, 2027. The government also accepted the MSA's recommendations relating to supply adequacy by passing the *Supply Cushion Regulation*,⁶⁴ which will also expire on November 30, 2027. The *Supply Cushion Regulation* requires the AESO to issue unit commitment directives to long lead time generators when it forecasts a supply cushion below the threshold of 932 megawatts. Rules to facilitate the implementation of both regulations are required to be in effect by July 1, 2024.⁶⁵

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 October 23, 2023 highlighting anticipated changes to transmission system planning in the province that are

⁶⁰ Alberta Electric System Operator, Alberta's Restructured Energy Market, AESO Recommendation to the Minister of Affordability and Utilities (31 January 2024), online: <<https://www.aesoengage.aeso.ca/37884/widgets/156642/documents/125518>>.

⁶¹ Market Surveillance Administrator, "Confidential Advice to Executive Council and the Minister of Affordability and Utilities, Advice to support more effective competition in the electricity market: Interim action and an Enhanced Energy Market for Alberta." (21 December 2023), online: <<https://www.albertamsa.ca/assets/Documents/MSA-Advice-to-Minister.pdf>>.

⁶² Alberta, Ministry of Affordability and Utilities, Direction Letter from the Minister of Affordability and Utilities (11 March 2024), online: <<https://www.aesoengage.aeso.ca/37884/widgets/156642/documents/125532>>.

⁶³ Market Power Mitigation Regulation, Alta Reg 43/2024 [*MPMR*].

⁶⁴ Supply Cushion Regulation, Alta Reg 42/2024 [*SCR*].

⁶⁵ *MPMR*, s 6(2); *SCR*, s9(2).

expected to unfold in 2024.⁶⁶ In addition to a number of near-term amendments to Alberta's *Transmission Regulation*,⁶⁷ 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 more wide-sweeping policy changes to transmission system planning in the long-term. 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 neighboring 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.⁶⁸ However, this non-emitting generation is not evenly distributed across the country and interconnections between provincial electricity grids – referred to as interties – are expected to be an important part of achieving net zero emissions from electricity generation in Canada by 2050.⁶⁹ Interties, and the question of whether they are managed in a way that ensures fair market access, are the subject of two ongoing 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**),⁷⁰ and (2) BHE Canada Limited's (**BHE**) complaint

⁶⁶ *Ibid.*

⁶⁷ Transmission Regulation, Alta Reg 86/2007 [*TReg*].

⁶⁸ Canada Gazette, Part I, Volume 157, Number 33: Clean Electricity Regulations, Regulatory Impact Analysis Statement (19 August 2023), online: <<https://www.gazette.gc.ca/rp-pr/p1/2023/2023-08-19/html/reg1-eng.html>>.

⁶⁹ *Ibid.*

⁷⁰ Canada Energy Regulator, File 3430456, *NorthPoint Energy Solutions Inc.: Complaint against the Manitoba Hydro-Electric Board regarding fair market access required by Electricity Export Permit EPE-404*, online: <<https://apps.cer-rec.gc.ca/REGDOCS/Item/View/4416865&ntb=1>> [*NorthPoint Complaint*].

against the AESO before the AUC.⁷¹

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 United States 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.⁷² There is speculation that the *NorthPoint Complaint* could influence the federal government to develop policies that incentivize domestic interties. 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.

In contrast to NorthPoint's alleged prioritization of market participants from the United States, the *BHE Complaint* alleges that such market participants have been discriminated against by the AESO. The *BHE Complaint* alleges that the AESO has, through its tariff, rules and reliability standards, systematically discriminated against intertie and import customers, particularly those from the United States, and has thereby deprived them of a reasonable opportunity to access Alberta's wholesale electricity market.⁷³ The AUC's complaint jurisdiction over the AESO is established by sections 25 and 26 of the *Electric Utilities Act*,⁷⁴ which permit or require the AUC to dismiss complaints if they have or should be investigated by the MSA, or if the substance of the complaint has already been dealt with by the Commission or any other body. Following an initial comment process, the MSA advised the AUC that it had commenced an investigation into

⁷¹ Alberta Utilities Commission, Proceeding 28829, *BHE Canada Limited Notice of Complaint* (15 February 2024), online: <[://www2.auc.ab.ca/Proceeding28829/SitePages/Home.aspx](https://www2.auc.ab.ca/Proceeding28829/SitePages/Home.aspx)> [*BHE Complaint*].

⁷² National Energy Board, Permit EPE-404 (30 July 2015), online: <<https://apps.cer-rec.gc.ca/REGDOCS/File/Download/2809333>>.

⁷³ Alberta Utilities Commission, Exhibit 28829-X0068, *Ruling on treatment of BHE complaint* (30 April 2024), online: <https://www2.auc.ab.ca/Proceeding28829/ProceedingDocuments/28829_X0068_AUC%20letter%20-%20Ruling%20on%20treatment%20of%20BHE%20Complaint_000081.pdf> [Complaint Decision] at para 23.

⁷⁴ *Electric Utilities Act*, SA 2003, c E-5.1 [EUA].

the conduct of the AESO regarding, among other things, the management of transmission constraints and system capability, capacity, utilization, and planning.⁷⁵ On April 30, 2024, the 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 the AUC. BHE filed an application for review and variance of the AUC ruling⁷⁶ and the process for considering the remaining portions of the complaint is yet to be determined.

A less combative intertie development is Nova Scotia's recent approval of the NS-NB Reliability Intertie Project.⁷⁷ The 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. The Project is the first phase of a modified Atlantic Loop which would have connected Quebec's hydro generation with the Maritime provinces.⁷⁸

G. Distribution

On January 24, 2024, the AUC released a report analyzing Alberta's electricity distribution system in the context of achieving net-zero emissions goals.⁷⁹ According to the report, the 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. These costs are expected to be driven by the need for substantial infrastructure investment, electric vehicle

⁷⁵ Complaint Decision, para 6.

⁷⁶ Alberta Utilities Commission, Proceeding 29037, *BHE Canada Application for Review and Variance of AUC Ruling 28829-X0068* (15 May 2024), online: <<https://www2.auc.ab.ca/Proceeding29037/SitePages/Home.aspx>>.

⁷⁷ Nova Scotia, Minister of Environment and Climate Change, *Environmental Assessment – Nova Scotia Power Incorporated, NS-NB Reliability Intertie Project, Cumberland and Colchester Counties* (15 December 2023), online: <<https://www.novascotia.ca/nse/ea/ns-nb-reliability-intertie/nnri-decision.pdf>>.

⁷⁸ Yuzda et al., "Recent Legislative and Regulatory Developments of Interest to Energy Lawyers," *Alberta Law Review*, Vol. 61, No. 2., 2023, p. 489.

⁷⁹ Alberta Utilities Commission, Net-Zero Analysis of Alberta's Electricity Distribution System (22 January 2024), online: <https://media.www.auc.ab.ca/prd-wp-uploads/regulatory_documents/Reference/Net-Zero%20Analysis%20of%20Alberta%E2%80%99s%20Electricity%20Distribution%20System.pdf>.

and residential solar adoption, and necessary enhancements to accommodate the deployment and electrification of distributed energy resources. However, substantial cost reductions (up to \$800 million) can be achieved through system optimization.⁸⁰

4. 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.⁸¹ 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 of 2023, the federal government launched the first call for proposals for the Critical Minerals Infrastructure Fund.⁸² \$300 million in contribution funding is available under two streams. Stream 1 funds are for preconstruction activities, including feasibility studies, planning, design work, and stakeholder engagement. Stream 2 funds are for shovel-ready projects and cover e.g. preparation, construction, rehabilitation, and similar costs. The funding is capped at \$50

⁸⁰ *Ibid* at 57.

⁸¹ 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), online: <open.alberta.ca/dataset/9d147a23-cb06-413d-a60e-ad2d7fe4e682/resource/73ebd14b-a687-4772-9982-48843b677c28/download/energy-renewing-albertas-mineral-future-report-2021.pdf>; Government of Canada, *The Canadian Critical Minerals Strategy From Exploration to Recycling: Powering the Green and Digital Economy for Canada and the World* (Ottawa: Ministry of Natural Resources, December 2022), online: <<https://www.canada.ca/en/campaign/critical-minerals-in-canada/canadian-critical-minerals-strategy.html>>; Government of Ontario, *Ontario's Critical Mineral Strategy: Unlocking Potential to Drive Economic Recovery and Prosperity* (Toronto: Northern Development, Mines, Natural Resources and Forestry, March 2022), online: <<https://www.ontario.ca/page/ontarios-critical-minerals-strategy-2022-2027-unlocking-potential-drive-economic-recovery-prosperity>>.

⁸² Natural Resources Canada, Government of Canada to Enhance Critical Minerals Sector With Launch of \$1.5 Billion Infrastructure Fund (News Release) (Ottawa: Natural Resources Canada, 31 October 2023), online: <<https://www.canada.ca/en/natural-resources-canada/news/2023/10/government-of-canada-to-enhance-critical-minerals-sector-with-launch-of-15-billion-infrastructure-fund.html>>.

million per project for nongovernmental applicants and \$100 million per project for provincial and territorial governments.

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.⁸³ In addition to centralizing the regulatory functions for minerals exclusively under AER jurisdiction, the *MRDA* split the regulation of minerals into two groups – brine-hosted minerals and rock-hosted minerals. The portions of the *MRDA* and related regulations pertaining to brine-hosted mineral development came into effect on March 1, 2023.⁸⁴ The portions of the *MRDA* relating to rock-hosted minerals came into effect on February 28, 2024, together with regulations to establish permitting, licensing, approval and operating standards for rock-hosted mineral resource development.⁸⁵ The AER has issued accompanying directives regarding each type of mineral resource.⁸⁶ This regulatory framework applies to exploration and development of numerous critical minerals including lithium, uranium, potash and rare earth elements.⁸⁷ Centralizing the regulatory functions for critical minerals under the AER is expected to enable the AER to address conflicts between oil and gas and mineral resource development and minimize regulatory burden for developers via a single window for resource development.

⁸³ *Mineral Resource Development Act*, SA 2021, c M-16.8 [*MRDA*].

⁸⁴ *Brine-hosted Mineral Resource Development Rules*, Alta Reg 17/2023.

⁸⁵ *Rock-hosted Mineral Resource Development Rules*, Alta Reg 14/2024.

⁸⁶ Alberta Energy Regulator, *Directive 090: Brine-Hosted Mineral Resource Development* (2 March 2023), online: <<https://static.aer.ca/prd/documents/directives/Directive090.pdf>>; Alberta Energy Regulator, *Directive 091: Rock-Hosted Mineral Resource Development* (29 February 2024), online: <<https://static.aer.ca/prd/documents/directives/Directive-091.pdf>>.

⁸⁷ *MDRA*, *supra* note 77 at s 1(1)(p).

C. Saskatchewan Helium and Brine Mineral Tenure

In October 2023, the Saskatchewan government introduced the Helium and Brine Mineral Tenure Policy.⁸⁸ 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. This policy applies on a go-forward basis as of October 16, 2023. Therefore, consent must still be obtained from helium or brine mineral tenure holders that were issued such rights prior to October 16, 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.

5. 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 the AER continues to roll out the components of its Liability Management Framework. Court and regulatory decisions pertaining to AlphaBow Energy Ltd. highlight important procedural points for energy lawyers engaging with regulatory appeals and provide some insight into the 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 the BCER introduced its PCA program to replace the previous liability management rating program. The PCA program requires licensees to either submit security deposits or complete abandonment, assessment, remediation or restoration work

⁸⁸ Ministry of Energy and Resources, Bulletin BT2023-011 – Helium and Brine Mineral Tenure Policy, (16 October 2023), online: <<https://publications.saskatchewan.ca/#/products/122226>>.

on their dormant, inactive and marginal (**DIM**) sites if their financial risk is assessed as moderate or high under the program. 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. Effective June 1, 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.⁸⁹ As of June 1, 2024, the PCA program will be expanded to include dormant facilities and pipelines,⁹⁰ 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 January 1, 2024, prescribes timelines for the restoration of dormant pipelines and facilities in addition to dormant wells.⁹¹

B. Alberta Liability Management Framework Updates

Implementation of the AER's Liability Management Framework⁹² has continued over the past year, including updates to the Inventory Reduction Program under *Directive 088: Licensee Life-Cycle Management*,⁹³ 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

⁸⁹ British Columbia Energy Regulator, Information Update, "Changes to the Permittee Capability Assessment (PCA) Program (TU 2023-06)" (17 May 2023), online: <<https://www.bc-er.ca/news/changes-to-the-permittee-capability-assessment-pca-program-tu-2023-06/>>.

⁹⁰ British Columbia Energy Regulator, Technical Update, "Program Expands to Include Dormant Facility & Pipeline Liability (TU 2024-03)" (18 March 2024), online: <<https://www.bc-er.ca/news/program-expands-to-include-dormant-facility-pipeline-liability-tu-2024-03/>>.

⁹¹ *Dormancy and Shutdown Regulation*, BC Reg 112/2019.

⁹² 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 the AER to develop and implement this framework. Alberta, "Oil and Gas Liabilities Management," online: <www.alberta.ca/oil-and-gas-liabilities-management.aspx>.

⁹³ Alberta Energy Regulator, *Directive 088: Licensee Life-Cycle Management* (Calgary: AER, 13 February 2023), online: <<https://www.aer.ca/regulating-development/rules-and-directives/directives/directive-088>> [Directive 088].

process and closure spend quotas, the latter of which has been subject to some changes this year. The AER sets an annual industry-wide closure spend requirement (\$700 million for 2024) as well as a mandatory closure spend quota for each licensee.⁹⁴ In 2022 and 2023, licensees could commit to a supplemental closure spend in exchange for leniency on other regulatory requirements. Specifically, if a licensee committed to a supplemental closure spend and submitted a confirmed area-based closure project to the AER, they would receive a 2-year extension to the deadline for removing surface equipment from surface-abandoned wells and a 3-year extension for otherwise expired Crown mineral leases. As of January 1, 2024, these extensions are no longer available, and licensees are not able to commit to a supplemental closure spend quota.⁹⁵

The AER published its 2022 Liability Management Performance Report on January 17, 2024.⁹⁶ 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. It is unclear whether the exemption-related incentives for supplemental closure spending contributed to this performance. The AER is exploring opportunities to improve the Inventory Reduction Program,⁹⁷ 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 the AER's liability management regime. The 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

⁹⁴ Alberta Energy Regulator, "Closure Spend Quotas," online: <<https://www.aer.ca/regulating-development/project-closure/liability-management-programs-and-processes/inventory-reduction-program/closure-spend-quotas>> [AER Closure Spend Quotas].

⁹⁵ Alberta Energy Regulator, *Manual 023: Licensee Life-Cycle Management* (December 2023), s 4.2.2, online: <<static.aer.ca/prd/documents/manuals/Manual023.pdf>> [AER Manual 023].

⁹⁶ Alberta Energy Regulator, "Liability Management Performance Report," online: <<https://www.aer.ca/protecting-what-matters/holding-industry-accountable/industry-performance/liability-management-industry-performance>>.

⁹⁷ AER Closure Spend Quotas, *supra* note 88.

regulatory and environmental liabilities. While the holistic licensee assessment outlined in Directive 088 has replaced the LMR for the purpose of assessing licence transfer applications,⁹⁸ complete replacement of the LMR has been challenging because the LMR is integrated into numerous AER Directives and the *Oil and Gas Conservation Rules*.⁹⁹ On November 16, 2023, the 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*. Stakeholder consultation regarding these amendments will take place in 2024 and draft documents will be available for public comment before being finalized.¹⁰⁰

While few details have been provided, the 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 lifecycle 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”.¹⁰¹ Under the current security framework, the AER retains significant discretion when determining the amount of security to collect.¹⁰² Whether such discretion is maintained as the new security framework is implemented will likely be a point of interest for industry stakeholders and energy lawyers.

⁹⁸ Alberta Energy Regulator, “Holistic Assessment and License Capability Assessment,” online: <<https://www.aer.ca/regulating-development/project-closure/liability-management-programs-and-processes/holistic-assessment-and-licensee-capability-assessment>>.

⁹⁹ *Oil and Gas Conservation Rules*, Alta Reg 151/1971 [OGCR]. See e.g. OGCR ss 1.100(b.1), which states that the AER may require a licensee to provide a security deposit at any time the licensee fails a liability management rating assessment conducted by the AER.

¹⁰⁰ Alberta Energy Regulator, *Bulletin 2023-41: Ongoing Implementation of the Liability Management Framework* (16 November 2023), online: <<https://static.aer.ca/prd/documents/bulletins/Bulletin-2023-41.pdf>> [AER Bulletin 2023-41].

¹⁰¹ *Ibid* at 2.

¹⁰² See e.g. AER Manual 023, *supra* note 89 at s 6.1 and 6.1.2.

C. AlphaBow Energy Ltd. Regulatory Appeals

Background

AlphaBow Energy Ltd. (**AlphaBow**) is a privately-owned Alberta oil and gas company that holds 8147 AER licences. The company was created through a series of amalgamations in 2018 and has experienced several financial and regulatory compliance challenges.¹⁰³ AlphaBow and the 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. As of February 2024, these liabilities amounted to \$264 million, approximately 58 percent of which (\$155 million) related to inactive or abandoned sites.¹⁰⁴ Following AlphaBow's non-compliance with an initial enforcement order,¹⁰⁵ CLM issued an order on March 30, 2023 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 (i.e., 10 percent of AlphaBow's inactive liability) (**March Order**).¹⁰⁶ AlphaBow requested a regulatory appeal of the March Order, and a stay of the March Order pending the outcome of the regulatory appeal. The AER reserved its decision regarding the regulatory appeal but denied AlphaBow's stay request on May 10, 2023 (**AER Stay Decision**). After AlphaBow failed to comply with certain aspects of the March Order, CLM ordered AlphaBow to suspend its operations pursuant to section 27 of the *Oil and Gas Conservation Act*¹⁰⁷ and section 23 of the *Pipeline Act* on June 5, 2023 (the **June Order**).¹⁰⁸

Court of Appeal

AlphaBow engaged the Court of Appeal of Alberta ("**Court**") 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. The Court considered

whether Rules 3.23(1), 14.37(1) or 14.48 of the *Alberta Rules of Court* provided it with the requisite authority to stay portions of the March Order, even though the March Order was not under appeal. These Rules authorize the Court to “stay proceedings or enforcement of a decision pending appeal”, “hear and decide any application incidental to an appeal” and “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”. 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.¹⁰⁹ The Court’s decision highlights the importance of statutory appeal deadlines and confirms that the Court does 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,¹¹⁰ 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.¹¹¹

The Regulatory Appeals

The AER considered AlphaBow’s regulatory appeals for both the March Order and June Order (collectively, the **Orders**) at a hearing in late 2023. The regulatory appeals focused on

¹⁰³ *AlphaBow Energy Ltd. Regulatory Appeals AER Orders (Regulatory Appeals 1943516 and 1943521)*, 2024 ABAER 001 at para 4, online: <<https://static.aer.ca/prd/documents/decisions/2024/2024-ABAER-001.pdf>> [*AER AlphaBow Decision*].

¹⁰⁴ *Ibid* at para 3.

¹⁰⁵ Alberta Energy Regulator, Letter Decision: *Directive 067 Eligibility Status of AlphaBow Energy Ltd.*, (28 July 2022) online: <https://www1.aer.ca/compliancedashboard/enforcement/202207-13_AlphaBow%20Energy%20Ltd-Limited%20Eligibility.pdf>.

¹⁰⁶ Alberta Energy Regulator, Order 202303-58 (30 March 2023) online: <https://www1.aer.ca/compliancedashboard/enforcement/202303-58_AlphaBow%20Energy%20Ltd_Order.pdf>.

¹⁰⁷ *Oil and Gas Conservation Act*, RSA 2000, c O-6 [OGCA].

¹⁰⁸ Alberta Energy Regulator, Order 202306-09 (5 June 2023) online: <https://www1.aer.ca/compliancedashboard/enforcement/202306-09_AlphaBow%20Energy%20Ltd_Order.pdf>.

¹⁰⁹ *Ibid*, paras 16, 29-45.

¹¹⁰ *AlphaBow Energy Ltd v Alberta Energy Regulator*, 2023 ABCA 221.

¹¹¹ *AlphaBow Energy Ltd v Alberta Energy Regulator*, 2023 ABCA 239.

AlphaBow's allegations that the Orders were procedurally unfair and that the requirements imposed by the Orders were unreasonable. The AER reconsideration panel (**panel**) determined that AlphaBow had adequate notice and opportunity to be heard¹¹² and that AlphaBow had presented insufficient evidence to support its reasonable apprehension of bias allegation.¹¹³ In response to AlphaBow's argument that the Orders did not align with AER norms, guidelines and precedents, the panel highlighted that the AER has "significant discretion and flexibility" when selecting appropriate compliance and enforcement measures.¹¹⁴ The panel also held that the CLM had not exercised its discretion to issue the Orders in a manner that was unreasonable. 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.¹¹⁵

AlphaBow argued that June Order, which requires it to cease operations, was unreasonable because it would cut off AlphaBow's cash flow and force it into insolvency. In AlphaBow's submission, this would shift assets to the Orphan Well Association and harm, rather than protect, the public and the environment.¹¹⁶ 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.¹¹⁷ 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 a company-wide suspension), and (b) when the AER provides justification that the sites at issue pose a risk to the public or the environment. AlphaBow's argument focused on section 27(3) of the OGCA which states that the AER "may order that a well or facility be suspended or abandoned where the Regulator considers

¹¹² *AER AlphaBow Decision*, *supra* note 97 at paras 41-70.

¹¹³ *Ibid* at paras 75-106.

¹¹⁴ *Ibid* at paras 58, 107-109.

¹¹⁵ *AER AlphaBow Decision*, *supra* note 97 at para 140.

¹¹⁶ *Ibid* at paras 211-212.

¹¹⁷ *Ibid* at paras 220-224, 233-236.

that it is necessary to do so in order to protect the public or the environment”.¹¹⁸ While the panel acknowledged that the 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. The panel highlighted that AlphaBow holds over 8000 AER licences, which would make a site-specific approach particularly challenging.¹¹⁹

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. The AER’s regulatory appeal decision also provides interpretive guidance with respect to section 27 of the OGCA and the scope of the AER’s compliance and enforcement powers in the context of the evolving Liability Management Framework.

6. PIPELINES

The Trans Mountain Expansion Project continues to attract attention as it nears commercial operation and seeks approval for its Commencement Date Tolls from the CER. Regulatory developments in the pipeline sphere 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.

¹¹⁸ OGCA, *supra* note 102 at s 27(1). Similar language is used in section 23(2) of the *Pipeline Act*, RSA 2000, c P-15: “The 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].

¹¹⁹ AER *AlphaBow Decision*, *supra* note 97 at para 257.

A. Trans Mountain Pipeline Expansion Interim Toll

On November 30, 2023, the CER issued a preliminary decision regarding Trans Mountain Pipeline ULC's (**Trans Mountain**) application for interim tolls for the expanded Trans Mountain Pipeline System (**TMEP**).¹²⁰ The CER approved Trans Mountain's commencement date tolls on an interim basis, enabling Trans Mountain to begin charging shippers at the commencement date. The approved benchmark toll of \$11.46/barrel was calculated based on Trans Mountain's most recent cost estimate for the TMEP, forecasted volumes and other variable costs. The fixed cost portion of the toll is nearly double the amount that Trans Mountain had estimated in 2017.¹²¹

A more detailed analysis of Trans Mountain's proposed tolls is ongoing as part of the final interim tolls hearing.¹²² Several shippers have intervened in the proceeding, which is currently in the information request stage. Among other things, the List of Issues set by the CER includes the question of "whether [the] significant costs and expenses allocated to Uncapped Costs were reasonably and necessarily incurred, as stipulated in the Facility Support Agreement."¹²³ The 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.¹²⁴

¹²⁰ Canada Energy Regulator, *RH-002-2023 Preliminary Decision*, File OF-Tolls-Group1-T260-2023-03 01 (30 November 2023), online: <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90465/92835/552980/4301738/4369664/4369668/4423082/C27479%2D1_Letter_Decision_to_Trans_Mountain_Pipeline_ULC_%2D_RH%2D002%2D2023_%2D_Preliminary_Decision_%2D_A8U8X8.pdf?nodeid=4422743&vernum=-2> [*RH-002-2023 Preliminary Decision*].

¹²¹ *Ibid* at 5.

¹²² *Ibid*.

¹²³ CER, Process Letter No. 3, Appendix 1, List of Issues (12 October 2023), online: <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90465/92835/552980/4301738/4369664/4369668/4411640/C26601%2D1_Application_for_Interim_Commencement_Date_Tolls_and_Other_Matters_related_to_the_Transportation_of_Petroleum_on_the_Expanded_Trans_Mountain_Pipeline_System_%E2%80%933_Process_Letter_No._3_%2D_A8T3R6.pdf?nodeid=4411093&vernum=-2>, at 7.

¹²⁴ CER, Process Letter No. 2 – Decisions on Process and Participation (1 August 2023), online: <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90465/92835/552980/4301738/4369664/4369668/4397557/C25730%2D1_Process_Letter_No._2_%2D_Trans_Mountain_Pipeline_ULC_%2D_Application_for_Interim_Commencement_Date_Tolls_and_Other_Matters_related_to_the_Transportation_of_Petroleum_on_the_Expanded_Trans_Mountain_Pipeline_%2D_A8R9A8.pdf?nodeid=4397558&vernum=-2>.

B. Updated Alberta *Pipeline Rules*

Following a brief pause on new pipeline applications,¹²⁵ the AER announced updates to the *Pipeline Rules*¹²⁶ that came into effect on November 15, 2023.¹²⁷ 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. AER directives and manuals pertaining to pipelines, such as Directive 077¹²⁸ and 056¹²⁹ and Manuals 005¹³⁰ and 012,¹³¹ 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 re-basing application submitted by Enbridge in 2022. In its December 21, 2023 decision, the OEB held that Enbridge 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.¹³² To ensure stranded asset risk was appropriately addressed, the 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.¹³³ The OEB also determined that the revenue horizon that Enbridge must use to

¹²⁵ Alberta Energy Regulator, News Release, Bulletin 2023-38: “Temporary Pause on New Pipeline Applications” (31 October 2023), online: <<https://static.aer.ca/prd/documents/bulletins/Bulletin-2023-38.pdf>>.

¹²⁶ *Pipeline Rules*, Alta Reg 125/2023.

¹²⁷ Alberta Energy Regulator, News Release, Bulletin 2023-40: “Release of the New Pipeline Rules and Associated Instruments” (15 November 2023), online: <<https://static.aer.ca/prd/documents/bulletins/Bulletin-2023-40.pdf>>.

¹²⁸ Alberta Energy Regulator, *Directive 077: Pipelines – Requirements and Reference Tools* (15 November 2023), online: <<https://static.aer.ca/prd/documents/directives/Directive077.pdf>>.

¹²⁹ Alberta Energy Regulator, *Directive 056: Energy Development Applications and Schedules* (8 February 2024), online: <<https://static.aer.ca/prd/documents/directives/directive-056.pdf>>.

¹³⁰ Alberta Energy Regulator, *Manual 005: Pipeline Inspections* (15 November 2023), online: <<https://static.aer.ca/prd/documents/manuals/Manual005.pdf>>.

¹³¹ Alberta Energy Regulator, *Manual 012: Energy Development Applications; Procedures and Schedules* (27 March 2024), online: <<https://static.aer.ca/prd/documents/manuals/Manual012.pdf>>.

¹³² Ontario Energy Board, *Decision and Order*, EB-2022-0200 (21 December 2023), online: <<https://www.rds.oeb.ca/CMWebDrawer/Record/827754/File/document>> at 2.

¹³³ *Ibid* at 2.

determine the economic feasibility of small volume customer connections is zero, to account for stranded asset risk¹³⁴ and ensure the correct price signals are sent to residential and other developers.¹³⁵

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 the Okanagan Capacity Upgrade Project.¹³⁶ 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. The 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.¹³⁷ Having regard to the estimated project cost of \$327 million, the BCUC determined that approval of the project was not prudent and directed Fortis to examine short-term solutions for addressing its forecasted demand increase.

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.

7. INDIGENOUS LAW

A. UNDRIP Action Plan

The *United Nations Declaration on the Rights of Indigenous Peoples Act*¹³⁸ requires the

¹³⁴ *Ibid* at 2, 41.

¹³⁵ *Ibid* at 39-42.

¹³⁶ British Columbia Utilities Commission, *Decision and Order*, G-361-23 (Vancouver: BCUC, 22 December 2023), online: <<https://www.ordersdecisions.bcuc.com/bcuc/decisions/en/522057/1/document.do>>.

¹³⁷ *Ibid* at 24.

¹³⁸ *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

federal government to ensure the laws of Canada are consistent with *The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*. Similar to legislation established in British Columbia,¹³⁹ 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. On June 21, 2023, the Government of Canada unveiled its UNDRIP Action Plan comprised of 181 guiding measures spanning the 2023-2028 period.¹⁴⁰ 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 December 28, 2023, the CER issued a certificate of public convenience and necessity to NorthRiver Midstream Inc. (via its wholly owned subsidiary NorthRiver Midstream NEBC Connector GP Inc.).¹⁴¹ in respect of its NEBC Connector Project (**Project**).¹⁴² The Project consists of two parallel 215-kilometer condensate and natural gas liquids pipelines. It will provide an alternative transportation option for condensate and natural gas liquids producers in northeast British Columbia by connecting them to Alberta. The Project was proposed just months after the *Yahey v British Columbia*¹⁴³ decision (**Yahey**), in which the British Columbia Supreme Court

¹³⁹ *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

¹⁴⁰ Department of Justice Canada, *The United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan* (21 June 2023), online: <<https://www.justice.gc.ca/eng/declaration/ap-pa/ah/pdf/unda-action-plan-digital-eng.pdf>>.

¹⁴¹ CER, *Certificate of Public Conveyance*, File 3429412 (28 December 2023), online: <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/4090619/4158245/4157924/4427428/C27849%2D3_Commission_%E2%80%9393_Certificate_OC%2D067_%E2%80%9393_NorthRiver_%2D_NEBC_Connector_Project_%2D_A8V4X9.pdf?nodeid=4427098&vernum=-2>.

¹⁴² Commission of the CER, *Decision OH-001-2022: NorthRiver Midstream NEBC Connector GP Inc.* (18 October 2023), online: <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/4090619/4158245/4157924/4412911/C26744%2D1_Commission_%2D_Commission_of_the_CER_Report_OH%2D001%2D2022_%2D_NorthRiver_Midstream_NEBC_Connector_GP_Inc._%E2%80%9393_NEBC_Connector_Project_%2D_A8T6C4.pdf?nodeid=4411708&vernum=-2> [NEBC Decision].

¹⁴³ *Yahey v British Columbia*, 2021 BCSC 1287.

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**). The Project is located within Treaty 8 and traverses the BRFN Claim Area. The CER found that the British Columbia Supreme Court's declarations in *Yahey* applied to the provincial Crown and were not binding on it. However, the 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 participant funding, a process workshop, three rounds of IRs 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.¹⁴⁴ The CER ultimately recommended approval of the Project subject to 49 conditions which address environmental effects and safeguard Indigenous and Treaty rights. Indeed, the incorporation of Indigenous knowledge and engagement with potentially affected Indigenous groups is a key feature of many approval conditions.¹⁴⁵ 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

The 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

¹⁴⁴ NEBC Decision, *supra* note 136, at section 2.5.

¹⁴⁵ Canada Energy Regulator, News Release, "Commission of the CER recommends approval for the NEBC Connector Project with 49 conditions", (18 October 2023), online: <<https://www.cer-rec.gc.ca/en/about/news-room/news-releases/2023/commission-cer-recommends-approval-nebc-connector-project-with-49-conditions.html>>.

with the *Blueberry River First Nations Implementation Agreement*¹⁴⁶ and that appropriate pre-application engagement with the BRFN has occurred. As of June 30, 2023, applicants for BCER authorizations are required to determine if proposed activities overlap with the BRFN's consultation boundary and complete a prescribed BRFN Implementation Agreement Form if such overlap occurs.¹⁴⁷ Separately, the BCER and Treaty 8 First Nations have co-developed *Treaty 8 Planning and Mitigation Measures*¹⁴⁸ outlining specific planning requirements and operational practices for energy resource activities that occur in Treaty 8 Territory. Effective April 15, 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.¹⁴⁹ 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.¹⁵⁰

8. ENVIRONMENTAL LAW

The federal government continues to implement legislative changes to facilitate its commitments relating to environmental matters. It has made substantial amendments to the *CEPA* for the first time since its enactment in 1999, including the codification of the right to a healthy environment, and intends to adjust the impact assessment regime in response to the Supreme Court of Canada's October 2023 decision confirming that the "designated project"

¹⁴⁶ British Columbia, *Blueberry River First Nations Implementation Agreement*, 18 January 2023, online: <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/blueberry_river_implementation_agreement.pdf>.

¹⁴⁷ BCER, "BCER and BRFN have worked together to develop a new consultation process" (30 June 2023), online: <<https://www.bc-er.ca/news/brfn-and-bcer-work-together-to-develop-consultation-process-iu-2023-12/>>.

¹⁴⁸ BCER, "Treaty 8 Planning and Mitigation Measures" (15 January 2024), online: <<https://www.bc-er.ca/files/operations-documentation/Environmental-Management/Treaty-8-Planning-and-Mitigation-Measures.pdf>>.

¹⁴⁹ BCER, "New Planning and Mitigation Measures for Energy Resource Activities in Treaty 8 Territory (IU 2024-01)" (15 January 2024), online: <<https://www.bc-er.ca/news/new-planning-and-mitigation-measures-for-energy-resource-activities-in-treaty-8-territory-iu-2024-01/>>.

¹⁵⁰ BCER, "Upcoming Shifts to the BCER's Consultation Processes" (29 April 2024).

aspects of the regime are unconstitutional. 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 October 13, 2023, the SCC issued its decision in *Reference re Impact Assessment Act*.¹⁵¹ 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 SCC found that the designated projects scheme established by the *Impact Assessment Act*¹⁵² is unconstitutional. 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 legislative jurisdiction.¹⁵³ 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 SCC's decision and issued guidance on October 26, 2023 regarding how the *IAA* will be administered pending legislative amendments (**Interim Guidance**).¹⁵⁴ 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

¹⁵¹ *Reference re Impact Assessment Act*, 2023 SCC 23 [IAA Reference].

¹⁵² *Impact Assessment Act*, SC 2019, c 28, s 1 [IAA].

¹⁵³ IAA Reference, *supra* at note 145 at para 6.

¹⁵⁴ Government of Canada, News Release, "Government of Canada Releases Interim Guidance on the *Impact Assessment Act*" (26 October 2023), online: <<https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/statement-interim-administration-impact-assessment-act-pending-legislative-amendments.html>>.

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 April 30, 2024, the Government of Canada introduced *IAA* amendments to address the SCC's decision via the *Budget Implementation Act, 2024, No. 1*.¹⁵⁵ The proposed amendments¹⁵⁶ replace the current definition of "effects within federal jurisdiction" with the narrower term "adverse effects within federal jurisdiction." This term narrows the scope of effects that may be considered to "non-negligible adverse changes" 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.¹⁵⁷ 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. 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.¹⁵⁸ 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 an assessment processes from another jurisdiction. That jurisdiction will retain final decision-making authority for the portions of the assessment for which it is responsible.¹⁵⁹ 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

¹⁵⁵ Bill C-69, *An Act to implement certain provisions of the budget tabled in Parliament on April 16, 2024*, 1st Sess, 44th Parl, 2024 [*Bill C-69*].

¹⁵⁶ Impact Assessment Agency of Canada, "Proposed Amendments to the *Impact Assessment Act*" (2 May 2024), online: <<https://www.canada.ca/content/dam/iaac-acei/documents/acts-regulations/proposed-amendments-eng.pdf>>.

¹⁵⁷ *Bill C-69*, s. 271(3).

¹⁵⁸ *Ibid*, ss. 275, 277.

¹⁵⁹ *Ibid*, ss. 280-282, 285.

outside federal jurisdiction, when assessing whether adverse effects are in the public interest. 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 Canada's ability to meet its environmental obligations and climate change commitments.¹⁶⁰

B. Updates to the *Canadian Environmental Protection Act*

The *Strengthening Environmental Protection for a Healthier Canada Act*¹⁶¹ received royal assent on June 13, 2023, implementing the first set of significant amendments to the *CEPA* legislative scheme since 1999. 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. Hydraulic fracturing and tailings ponds are specifically identified as activities about which information may be requested.¹⁶² 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.¹⁶³ 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.¹⁶⁴ 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

¹⁶⁰ *Ibid*, ss. 289-291.

¹⁶¹ *Strengthening Environmental Protection for a Healthier Canada Act*, SC 2023, c 12.

¹⁶² *CEPA*, *supra* note 9 at s 46.

¹⁶³ *Ibid* at ss 73-74.

¹⁶⁴ *Ibid* at s 68(a)(iii.1) and (iii.2).

request that a chemical be assessed for inclusion in Schedule 1.¹⁶⁵ 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.¹⁶⁶

CEPA's preamble now confirms the government's commitment to the implementation of UNDRIP and recognition of the role Indigenous knowledge plays in environmental decision making.¹⁶⁷ It also includes a declaration that "every individual in Canada has a right to a healthy environment."¹⁶⁸ The Act'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." 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, with the comment period on the government's discussion document on this topic closed on April 8, 2024.¹⁶⁹

C. AEPA lays charges under the *Emissions Management and Climate Resilience Act*

Alberta's industrial carbon pricing and emissions trading regime is implemented pursuant

¹⁶⁵ *Ibid* at s 76.

¹⁶⁶ Ecojustice, "Request for assessment of naphthenic acids founds in oil-sand processed water (OSPW NAs) pursuant to s 76(1) of the *Canadian Environmental Protection Act 1999*" (11 March 2024), online: <<https://ecojustice.ca/wp-content/uploads/2024/03/2024-03-11-Letter-to-Minister-Guilbeault-re-s.-76-request-to-assess-OSPW-NAs.pdf>>. 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.

¹⁶⁷ *CEPA*, *supra* note 9, Preamble.

¹⁶⁸ *Ibid* at Preamble, s 2(1)(a.2).

¹⁶⁹ Government of Canada, Environment and Climate Change Canada and Health Canada, "Discussion Document on the Implementation Framework for a Right to Healthy Environment under the *Canadian Environmental Protection Act, 1999*" (February 2024), online: <https://publications.gc.ca/collections/collection_2024/eccc/En14-542-2024-eng.pdf>.

to the *Technology Innovation and Emissions Reduction Regulation*.¹⁷⁰ *TIER* is enacted under the *Emissions Management and Climate Resilience Act*¹⁷¹ which, among other things, makes it an offence to provide false or misleading information under *TIER*.¹⁷² Pursuant to *TIER*, regulated facilities must submit annual compliance reports outlining how they have satisfied their emission reduction requirements.¹⁷³ 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.¹⁷⁴ Compliance reports and *TIER*-generated credits must be verified by an accredited third-party assurance provider¹⁷⁵ and the associated verification reports must be peer reviewed in accordance with *TIER*¹⁷⁶ and the *Standard for Validation, Verification and Audit*.¹⁷⁷

In May 2023, AEPA laid twenty-five 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.¹⁷⁸ Ms. 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 3 years, and was required to prepare an article for publication in the Environmental Services Association of Alberta Weekly News outlining her experience.¹⁷⁹ The

¹⁷⁰ Alta Reg 133/2019 [*TIER*].

¹⁷¹ *Emissions Management and Climate Resilience Act*, SA 2003, c E-7.8.

¹⁷² *Ibid*, s 44.

¹⁷³ *TIER*, s 15.

¹⁷⁴ *TIER*, s 13.

¹⁷⁵ *TIER*, s 27.

¹⁷⁶ *TIER*, ss 15(4)(e), 15(6), 18(2), 18(3), 26(3).

¹⁷⁷ AEPA, "Standard for Validation, Verification and Audit, Version 5.2" (30 January 2023), online: <<https://open.alberta.ca/dataset/26b45734-4765-41cf-965c-ec945a6e4581/resource/c7aebb2e-b865-4f25-9b09-764f486169f1/download/epa-tier-standard-validation-verification-and-audit-version-5-2.pdf>>.

¹⁷⁸ Alberta, "Information on Behalf of His Majesty The King, Amberg Corp. and Olga Kiiker" (3 May 2023), online: <https://www.alberta.ca/system/files/custom_downloaded_images/epa-amberg-corp-and-olga-kiiker-sworn-information.pdf>.

¹⁷⁹ Agreed Statement of Facts, Alberta Court of Justice File No. 230422073P1 (21 November 2023), online: <<https://www.alberta.ca/system/files/epa-olga-kiiker-agreed-statement-of-facts.pdf>>.

article and agreed statement of facts¹⁸⁰ explain that the only Amberg Corp. employee qualified to complete peer reviews had left the company in December 2020 and no replacement was found. Ms. Kiiker used the former employee's electronic signature and posed as them in emails and peer review documents with a view to retaining clients. While the charges against Amberg Corp. were ultimately withdrawn by the Crown,¹⁸¹ the potential penalties associated with the charges were significant. Twenty-four of the twenty-five 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.¹⁸²

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.

¹⁸⁰ Sentencing Order pursuant to section 51(1) of the *Emissions Management and Climate Resilience Act*, Alberta Court of Justice File No. 230422073P1 (21 November 2023), online: <<https://www.alberta.ca/system/files/epa-olga-kiiker-creative-sentencing-order.pdf>>.

¹⁸¹ Alberta, "Environmental Compliance Prosecutions – Concluded files" (9 May 2024), online: <<https://www.alberta.ca/environmental-compliance-prosecutions-concluded-files>>.

¹⁸² *Emissions Management and Climate Resilience Act*, s 45; *TIER*, s 34.