Canadian energy oil and gas: Top 20 of 2020 - Regulatory decisions

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Part 2

Without question, the top story over the last year has been the COVID-19 pandemic and its tremendous ongoing effects felt across Canada and the world.

This time has had a significant impact on Canada's energy industry and many of the changes and developments that took place in 2020 will continue to influence trends, business decisions and the future growth of Canada's energy industry in 2021.

As we look back at 2020, we have highlighted the Top 20 industry developments and decisions made throughout the year in four key areas: Judicial decisions, regulatory decisions, legislative and policy developments, and transactions and trends.

In this article, we analyze the **top five regulatory decisions** of the last year and how these decisions may affect your business in 2021.

Top five regulatory decisions of 2020

In 2020, the Alberta Energy Regulator (AER) demonstrated its willingness to intervene in commercial transactions with its rejection of Shell Canada Limited's sale of its sour gas plants due to concerns over the splitting of the environmental liability. In addition, the AER proved the extent of its commitment to ensuring proper reclamation and abandonment with a two-year investigation resulting in the cancellation of some 59 reclamation certificates. The Canadian Energy Regulator is still hearing Enbridge's application to convert its Mainline pipeline to contract carriage. The Alberta Court of Appeal issued important rulings in relation to administrative tribunals, including its ruling that the AER must consider the honour of the Crown when reviewing projects in the public interest, and that the Alberta Environmental Appeal Board's test for standing was too restrictive.

1. Alberta energy regulator rejects splitting of environmental liability

After the Supreme Court of Canada's landmark *Redwater* decision highlighted the importance of accounting for environmental obligations in asset transfers, the AER signalled increased regulatory concern and willingness to intervene in commercial transactions in its May 13, 2020 letter decision regarding the application by Shell Canada Limited (Shell) and Pieridae Alberta Production Ltd. (Pieridae). Shell and Pieridae jointly sought regulatory approvals relating to the sale of Shell's sour gas processing plants to Pieridae, under a number of statutes, including the Environmental Protection and Enhancement Act[1] (EPEA). The AER rejected the parties' proposal to allocate historic liability for sulfinol and other substances to Shell while Pieridae assumed liability for all other remediation and reclamation activities.

The AER's reasons for rejecting the application focused on practical uncertainties of allocating liability and inconsistency with the polluter-pays principle under the EPEA. Firstly, the AER was concerned with the uncertainty of the scope of contamination at the sites, and how contamination could distinguished as between historic operations and ongoing operations for apportionment of liability. In this respect, the AER appeared to consider the potential for future litigation in determining the party liable for reclamation or remediation costs. The AER was also concerned with the proposal's incapability with the policy objectives and principles of the EPEA. In particular, the EPEA does not distinguish liability by specific substance, and the parties' obligations would still encompass the reclamation and remediation of entire sites. Further, the proposal was contrary to the polluter-pays principle, which requires that Shell (as polluter and operator) must be responsible for all substances at the site. The proposal would also diminish the AER's ability to ensure compliance given that Shell would no longer have an interest in continuing operations of the sites.

The AER's decision indicates limitations on the ability of parties to contractually allocate environmental liabilities. The limitation of the ability for commercial parties to construct transactions to address environmental liabilities among themselves will undoubtedly affect the pool of potential purchasers and the terms of the proposed sale. Parties looking to enter into sale transactions in the context of insolvency proceedings should consider the effect of the AER's decision on potential sale approval applications, as well as early engagement of the AER in the negotiation of potential transactions. For further discussion on the application by Shell and Pieridae Alberta, see our comment here.

2. Administrative tribunals responsible to uphold the honour of the Crown

In April 2020, the Alberta Court of Appeal released its decision in *Fort McKay First Nation v. Prosper Petroleum Ltd*[2]*.* The decision arose out of Fort McKay First Nation's (FMFN) appeal following the AER's approval of the Prosper Petroleum Ltd. (Prosper) application to build the Rigel oil sands bitumen recovery project within five kilometres of the FMFN Reserves.

The factual background included that the Government of Alberta and the FMFN had been taking part in ongoing negotiations for many years to develop the Moose Lake Access Management Plan (MLAMP) in order to address cumulative effects of oils sands development on the FMFN's Treaty 8 rights. The MLAMP included a 10km buffer zone, and it was to be subsumed into the Lower Athabasca Regional Plan (LARP). In 2014, the Alberta Premier committed via letter of intent to completing the MLAMP under the LARP by September 30, 2015.

The question before the AER was whether the project was in the public interest. The AER considered whether the project would infringe an aboriginal right but found little real evidence to establish such an infringement. The AER held that the Alberta cabinet should assess the adequacy of project consultations and the honour of the Crown, as opposed to the AER. The AER also did not consider the MLAMP negotiations or the further commitment to negotiations, as they had not yet been concluded.

The Court of Appeal allowed the appeal and found that the AER should have considered the honour of the Crown and the MLAMP process. The Court found that, where a tribunal is empowered to consider questions of law, questions of constitutional law should also be considered, unless there is a clear indication that the legislature intended to exclude them. While the AER could not assess the adequacy of Crown consultation, it was not restricted from assessing the duty to uphold the honour of the Crown. For further commentary on the *Fort McKay First Nation v. Prosper Petroleum decision, see our comment here*.

3. Enbridge applies to convert its mainline to contract carriage

In a watershed moment for the Western Canadian oil industry, Enbridge Inc. (Enbridge) applied to the Canada Energy Regulator (CER) to convert its Canadian Mainline pipeline, which represents approximately 70 per cent of the available oil pipeline capacity out of the Western Canadian Sedimentary Basin, from 100 per cent common carriage to 90 per cent contract carriage. The CER proceeding is in full swing, with participation from 39 different interveners from a broad cross-section of the industry.

Enbridge's CER application was precipitated by a number of complaints filed with the CER by shippers when Enbridge first announced in 2019 that it would be holding an open season for contract capacity prior to CER approval. During this time, shippers also lodged complaints about the high levels of apportionment of capacity caused by shippers nominating "air barrels", bidding for more capacity than they actually needed, so that when apportionment was applied, they would still be left with enough capacity to meet their needs.

The ongoing CER proceeding has already proven to be contested and the outcome is likely to have tremendous effects on the industry in western Canada, particularly with the recent cancellation of the US approvals for the Keystone XL pipeline. Access to oil pipeline transportation is at a premium, and the proposed switch to contract carriage would drastically reduce the amount of common or "spot" carriage available to producers. BLG continues to follow this proceeding and post on further developments as they occur.[3]

4. Alberta Court of Appeal expands standing before the Alberta Environmental Appeal Board

In the *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*[4] (the Board) decision in December 2020, the ABCA overturned the Board's determination that the applicant did not have standing because it failed to show it was directly affected by the decision under review. In making that ruling, the ABCA found that the test applied by the Board was too narrow.

Normtek Radiation Services Ltd. (Normtek) was in the business of transporting and disposing of naturally occurred radioactive materials (NORM) which accumulate as a waste product of oil and gas operations. Secure Energy Services Inc. (Secure) applied to the designated Director for an amended approval to allow Secure to accept and dispose of NORM at its Pembina Landfill. Normtek submitted a statement of concern in response to Secure's application claiming that the application would be outside the industry accepted standards for handling NORM with high levels of radioactivity. Accepting such materials at Secure's landfill would also give Secure a competitive advantage because Normtek, in accordance with accepted practices, disposed of its high radioactivity waste at salt caverns in Saskatchewan.

Normtek's letter of concern was rejected because it resided outside the areas of environmental impact associated with the project. Normtek appealed to the Board and the Board held an initial written proceeding on the issue of standing. Following that proceeding, the Board concluded the Normtek did not have standing because its concerns were primarily commercial or economic, and it could not show that its use of the natural resource would be affected. Normtek's application for judicial review was dismissed.

The ABCA reviewed the interpretation of being "directly affected" under the Act[5] and concluded that it was not necessary for the adverse impact to be on the appellant's actual use of a natural resource near the activity in order for the appellant to be "directly affected."[6] The ABCA also determined that economic impacts of an approval are sufficient for standing regardless of whether the economic effects link back to the environment.[7] As the Board's interpretation of "directly affected" was too restrictive, the ABCA remitted the matter back to the Board.

With the ABCA overturning the "restrictive" interpretation of "directly affected", this is likely to expand the persons that will have standing to appeal before the Board. The ABCA's finding that an economic interest that is not tied to the natural resource is sufficient for standing is likely to open the doors to more appeals before the Board. It remains to be seen how the Board will interpret the phrase "directly affected" in any particular matter given the judicial interpretation by the ABCA in this case going forward.

5. Alberta energy regulator cancels reclamation certificates

An investigation that began in 2018 culminated in the AER, on November 27, 2020 issuing warning letters to Aeraden Energy Corp. (Aeraden) and its service provider CEPro Energy & Environmental Services Inc. (CEPro), arising out of reclamation activities.[8] The AER investigated 59 well sites, which Aeraden and CEPro claimed had been properly abandoned and reclaimed, but which in fact were still strewn with debris, dead vegetation, and even one active well.

Aeraden and CEPro, the latter having signed off on the reclamation work, obtained reclamation certificates from the AER. However, local landowners quickly complained and the AER initiated its investigation. The results of the investigation found deficiencies ranging from groundwater monitoring wells left on site, fencing and berms remaining, and slumping and dead vegetation. In its investigation report, the AER stated that it "considers this matter to be very serious" and that "[w]ith additional time and investigation, it is likely that a more significant enforcement action would have been taken" – but the AER was constrained by a limitation period that prevented further

investigation. All 59 reclamation certificates were cancelled as a result of the investigation.

Given the heightened public awareness of the extent of abandoned oil and gas facilities in the province, and the concern around growing abandonment liabilities, companies must ensure they are properly fulfilling their abandonment and reclamation obligations. As demonstrated by the Aeraden case, the AER takes these matters very seriously and will devote significant resources to ensuring reclamation activities are completed and the certificates validly issued.

[1] RSA 2000, c E-12

[2] 2020 ABCA 163

[3] BLG's Alan Ross acts for ConocoPhillips while Randall Block, QC and Jonathan Liteplo act for the Explorers and Producers Association of Canada in this proceeding.

[4] 2020 ABCA 456

[5] Environmental Protection and Enhancement Act, RSA 200 c E-12

[6] Para. 105

[7] Para. 128

[8] Alberta Energy Regulator's (AER) enforcement response

By

Matti Lemmens, Karen A. Salmon, Bradon Willms

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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