2017 Year in Review: Top 10 Legislative and Regulatory Changes of Significance to the Canadian Energy Industry

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1. Efficiency Gains? New Federal *Energy Efficiency Regulations* Come Into Force

The federal *Energy Efficiency Regulations, 2016* (2016 Regulations) came into force on June 28, 2017, replacing the previous Energy Regulations (Regulations). The 2016 Regulations increase the minimum energy performance standards in 20 categories of residential and commercial products, requiring manufacturers to comply or face sanction. The 2016 Regulations were also rewritten in a more clear and structured manner, and do not contain references to "obsolete and out-of-date"[1] standards, as the Regulations had done. Reporting requirements were also modified with respect to some product categories, recognizing that exporters to new markets and to the United States should not be burdened with too much additional compliance where the target market may not have the same stringent regulatory standards.

2. Properly Assessment? Update on Federal Policy for Natural Resource Environmental Assessments

On June 29, 2017, the federal government released a discussion paper entitled "Environmental and Regulatory Reviews" (Discussion Paper) outlining "potential reforms being considered to rebuild trust and modernize Canada's environmental and regulatory processes."[2]The paper was informed by extensive public consultations, expert panel reports and parliamentary studies over the preceding 12 months and is expected to bring broad changes to the federal environmental assessment and regulatory regime, including changes to the *Canadian Environmental Assessment Act, 2012*, *National Energy Board Act*, *Fisheries Act*, and *Navigation Protection Act*.[3] Public comments on the Discussion Paper were invited until August 28, 2017.

The Discussion Paper reduced the scope of changes to the project approval process recommended by previous reports, offering a more balanced approach to statutory and policy changes required to update the federal environmental and regulatory framework. Nonetheless, the proposal is expected to add substantial complication, time, and cost to regulatory review of projects.

As a part of the new process, the federal government will:

- establish a single government agency responsible for assessments of federally designated projects. The review would include social, health and economic aspects of a project in addition to environmental impacts;
- require an early planning phase to foster greater collaboration and engagements between interested parties;
- focus on consultation with Indigenous peoples based on recognition of Indigenous rights and interests from the outset;
- emphasize and ensure co-operation with jurisdictions including Indigenous governments.

These are important changes for all players in the energy sectors and we will continue to follow these developments in 2018 as the federal government drafts the proposed changes.

3. Mid-century modern? The National Energy Board Modernization Report Looks Ahead

The National Energy Board (NEB) Modernization Report (the Report) was released in May 2017 and was entitled "Forward, Together: Enabling Canada's Clean, Safe and Secure Energy Future."[4] The Report was prepared by an expert panel that was tasked with "analysing the structure, role, and mandate of today's National Energy Board, and coming up with a set of recommendations to modernize the organization, and restore public trust in the institution."[5] Modernizing the NEB has been said to be a part of the current government's review of Canada's environmental assessment and regulatory processes announced in June 2016.

The Report outlines what the expert panel heard from a vast array of individuals, organizations and agencies, making a set of recommendations that are driven by six key themes. Although the Report made numerous recommendations, the key changes proposed by the expert panel were as follows:[6]

- alignment of the role of national energy regulator with national policy on energy and climate;
- replacement of the NEB by a new agency called Canadian Energy Transmission Commission (CETC);
- creation of a new Canadian Energy Information Agency;
- establishing a two-step decision-making project for new energy transmission projects where the first step would be to assess whether a proposed project is in the national interest, and the second step would provide for a detailed regulatory approval under the CETC and the Canadian Environment Assessment Agency;
- creation of an Indigenous Major Projects Office;
- creation of Public Intervenor Office;
- creation of Regional Multi-Stakeholder Committees;
- provision of an enhanced role for municipalities in proceedings;
- creation of a Landowners Ombudsman;
- establishment of stronger standards for land agents and review of compensation rules for infrastructure rights of way.

Further, the report recommends that the office of CETC's board of directors be located in Ottawa and not in Calgary. It has been suggested, however, that majority of the employees of the recommended organization would stay in Calgary.[7] The Discussion Paper released by the Government of Canada on June 29, 2017 does not appear to endorse all of the recommendations of the Report and, as a result, it will be interesting to see how many of the recommendations made in the Report are actually implemented.[8] We will closely monitor the progress in this respect in 2018.

4. Going Long? Ontario's Long Term Energy Plan Released

Ontario's 2017 Long-Term Energy Plan (LTEP or Plan) entitled *Delivering Fairness and* Choice provides a roadmap of the province's energy plan over the next 20 years and, according to the Ontario government, focuses on the affordability and reliability of a clean energy supply, giving consumers more choice in the way they use energy while at the same time offering ways to conserve it.[9]

The LTEP forecasts adequate electricity supply in the near future, but predicts a shortfall beginning in the early-to-mid 2020's as demand continues to rise due to electric vehicles and transit systems. It also contemplates market renewal which aims at moving away from long-term electricity contracts and towards more competitive mechanisms.[10]

Further, the Plan emphasizes consumer education, protection and choice in the energy sector. It proposes to redesign electricity bills to make them easier to read and understand, and expands the Green Button Initiative, which gives consumers the ability to access and manage their energy and water data for conservation and management purposes.[11]

Lastly, the LTEP contemplates unprecedented levels of First Nations and Metis involvement in the energy sector. It puts in plan the potential connection of as many as 21 First Nation communities to Ontario's electricity grid and working to engage in consultations on how to improve the Independent Electricity System Operator's (IESO) Energy Partnership Program, which connects First Nations and Metis communities with partner organizations to build out renewable energy and transmission projects.[12]

The IESO and Ontario Energy Board have been directed by the Minister of Energy to execute the LTEP, starting with preparing and submitting implementation plans for review by January 31, 2018.[13]

5. Plein d'action? Electrifying Québec with the 2017-2020 Action Plan

As a part of the 2017-2020 Action Plan (Action Plan), the Québec Minister of Energy and Natural Resources announced the jurisdiction's first volumetric requirements on renewable fuels, like ethanol and biodiesel. The blending requirement will start at 5% for gasoline and 2% for diesel, and these numbers would be escalated after 2020. The Action Plan forms the first of three documents seeking to implement Québec's 2030 Energy Policy aimed at reducing the province's dependence on fossil fuels by 40% between now and 2030.[14]

The Action Plan sets out 42 measures, backed by $1.5 billion in public investment, providing for concrete actions with the following objectives:

- increase the number of electric vehicles in Québec's fleet;
- address climate change and in reduction of greenhouse gas emissions;
- reduce oil dependence and therefore improve Québec's trade balance; and
- contribute to Québec's economic development by using the electric energy available in Québec.[15]

The Action Plan emphasizes Hydro-Québec's role as Québec's leading electricity producer: for instance, Hydro-Québec is instructed to develop a solar energy park as soon as practicable.[16] Further, the Government of Québec aims to increase the number of plug-in electric and hybrid vehicles in the province's fleet to 100,000 by 2020.[17]

The Action Plan proposes incentives to several industry sectors to adopt the recommended measures. Trucking companies will receive grants if they reduce their fleet's fuel consumption, while transportation and mining companies will be eligible for funding to convert vehicles to electricity, natural gas or propane.[18]

6. Price, point? The Implementation of Carbon Pricing in Alberta

The Alberta government released the climate leadership plan in November 2015 (Climate Leadership Plan) outlining the government's plan for combatting climate change in Alberta. Implementation of a new carbon price on greenhouse gas (GHGs) emissions was one of the strategies contemplated under the Climate Leadership Plan.[19] The enabling legislation for the plan, *The Climate Leadership Implementation Act*, received royal assent in June 2016.

Alberta's carbon levy took effect on January 1, 2017 and is expected to generate $3.9 billion in gross revenue over the next three years, more than half of which will be recycled through the small business tax cut and household rebates. The remainder is to be invested in programs that reduce emissions and diversify the economy. The levy is paid by consumers of fuel in Alberta, with rates determined by the emissions released when each fuel is combusted. Some specific fuels and uses are exempt from the levy, and consumers do not pay the levy on electricity, though industrial consumers do.

Alberta will transition from the current Specified Gas Emitters Regulation in January 2018. This system uses an output-based emission allocations approach for emissions-intensive industries. Any facility that emits 100,000 tonnes or more of greenhouse gases will be included in the new greenhouse gas management system. Many types of facilities fall under this system, not just oil and gas production and processing; coal- and gas-fired electricity generation will also be affected. Under the output-based allocation system, facilities will be allowed to emit a certain amount of greenhouse gases, free of charge from the carbon levy. This approach in principle protects industries from competitiveness impacts that could shift production to other jurisdictions. These "free" emissions will be determined based on a product-specific emissions benchmark. Benchmarks will be set relative to high-performing industry peers or competitors who produce the same or similar products.

According to the Government of Alberta, all revenue from the levy will be reinvested in efforts to reduce emissions; rebates to Albertans to offset costs increases; renewable energy projects and green infrastructure; and research and innovation. Although the cost of almost everything is expected to increase as a result of the levy, the government insists that the increase would be relatively small for consumers.[20]

A Climate Leadership Plan progress report, published in December 2017, provides an update on the actions taken, and the progress made, towards achieving the stipulated goals.

7. Well Done? Alberta Energy Regulator Orphan Wells Policy

As the *Redwater* decision by the Alberta Court of Appeal makes it way to the Supreme Court of Canada, the Alberta Energy Regulator (AER) is making policy changes to deal with the implications of the decision. In *Redwater*, the Court of Appeal held that trustees in bankruptcy have the right to disclaim uneconomic assets of a bankrupt producer, with the uneconomic assets becoming the responsibility of the Orphan Well Association, rather than having those costs borne by the estate. Effectively this allows the creditors to realize on their loans without having to make allowances for uneconomic assets.

Directive 067,released in December 2017, provides for greater discretion to the AER in allowing a licencee to acquire or maintain a licence. Changes brought about by the directive include requiring additional information at the time of application, increased discretion regarding the rejection of an application where an applicant poses a risk, and requirements for keeping corporate information up to date.[21]

Licence eligibility types have been simplified to the following three types: no eligibility, general eligibility, and limited eligibility. Further, all parties with current eligibility under Directive 067 are required to ensure that AER has accurate information on file, and notice of material changes must be provided within 30 days.[22] BLG has also confirmed that updated licencee information must be filed with the AER by January 31, 2018.

By making these changes, the AER is attempting to close what it considers a loophole in policy that allows directors and officials of oil and gas companies to use bankruptcy as an excuse to walk away from the wells that they are responsible for cleaning up. Further changes to policy regarding acquiring, maintaining, and abandoning oil and gas wells are expected in the coming months as the province continues its review of how orphan wells are regulated under the current system.[23]

In 2018, BLG will continue to be "watching the Directives" and how they may respond to the Supreme Court of Canada decision in *Redwater*.

8. Transfer, Payment? AER Changes Process to Transfer Application Decision

Pursuant to AER Bulletin 2017-13, the decision process for applications to transfer AER approvals has changed. Now, an application for transfer is subject to a standardized review period of 30 days before a decision is issued. The AER is encouraging applicants to submit all related applications and notifications for transfer at the same time. In accordance with section 30(2) of the *Responsible Energy Development Act*, the AER intends to combine all related transfer applications, publish them on its website, and review them concurrently regardless of whether they are received together or separately.[24]

The review period of 30 days ensures that the period for filing a statement of concern has lapsed before a decision is issued. However, all applications will continue to be published on public notice of application page on AER's website.[25]

In accordance with the Integrated Decision Approach advocated by the AER, changes to the decision process for transfer applications ensures that decisions on related applications are done concurrently, enabling the AER to manage approvals and issue a decision on related applications at the same time. This helps to make the decision-making-process consistent and transparent, allowing stakeholder input on related applications at one time rather than in individual pieces.[26]

9. Clean and Clear? Alberta Clean Power Update

In 2017, the Government of Alberta started to implement the Alberta Electric System Operator's (AESO) recommendation to transition from an energy market to a new framework that includes an energy market and a capacity market. In an energy-only market, generators are paid for the electricity they produce based solely on the wholesale price of electricity, which fluctuates. These companies decide on the type of generation they produce and on the location of facilities. In a capacity market, private power generators are paid through a mix of competitively auctioned contracts which pay their fixed capital costs and revenue from the spot market.[27]

The AESO recommended a capacity market for the following reasons: it ensures reliability, increases stability of prices, provides greater revenue certainty for generators, maintains competitive market forces and drives innovation and cost discipline, and supports policy discretion and is adaptable for the future. The AESO is responsible for designing and implementing the capacity market and the process is expected to take three years. A capacity market is anticipated to be in place by 2021.[28]

This transition is expected to support the Renewable Electricity Program's (REP) plan of phasing out emissions from coal-fired generation by 2030. The REP is intended to encourage the development of 5,000 MW of renewable electricity generation capacity connected to Alberta grid between now and 2030. The REP Round 1 started early in 2017. In REP Round 1, 12 proponents submitted bid prices for 26 projects, with four projects being selected including Edmonton-based Capital Power and two large international companies, EDP Renewable Canada Ltd. and Enel Green Power Canada Inc. BLG will continue to closely monitor how the next stages under the REP unfold in 2018.

The capacity market is expected to be implemented by 2021, with AESO estimating that it would take additional two years to complete the design of the market and another year to finalize legal contracts and to set up procurement process. As a result, the first capacity contracts are expected to be formed at least three years after the design process begins. This means that capacity procured through initial auction would likely be in service in 2024 at the earliest.[29]

10. Red, White and Cruise? Impact of U.S. Energy Policy on Canada

Early in 2017, President Trump issued an executive order (Order) inviting TransCanada Keystone Pipeline LP to re-submit its application to the State Department for a Presidential Permit for the construction and operation of the Keystone XL Pipeline (Keystone). Also included in the Order was a direction to the State Department to expeditiously review the application and reach a final determination within 60 days of TransCanada's application.

Although the invitation to apply to Keystone is encouraging for Canada, it remains a fact that President Trump has criticized Canadian energy policies on multiple occasions. Further, with the current Canadian emphasis on carbon pricing and phasing out energy policies that add to emissions of greenhouse gases, there is a valid concern that energy investment in Canada will become unattractive when compared its counterpart south of the border, especially considering President Trump's position on climate change and clean energy. It has been estimated that carbon pricing would lead to as much as a $20 billion to $25 billion increase in energy costs for Canadians, while the Americans face no corresponding increase. Almost certainly, this will result in a competitive advantage to the United States as far as energy investment is concerned.[30]

With carbon pricing already in place in Alberta and a national policy on its way, Canada and the United States have taken completely different routes in their approach to climate change and commitment to clean energy. While clean technology remains a priority for Canada, President Trump is committed to deregulating the energy industry and reviving coal-based energy production.

In 2018, BLG will be closely monitoring energy policy changes in the U.S., including what, if any, changes to the sector arise through the potential renegotiation of, or U.S. withdrawal from, NAFTA. NAFTA gave the United States secure access to Canadian energy when it incorporated the provisions of the Canada-U.S. Free Trade Agreement. Changes to, or dissolution of, NAFTA could dramatically impact what has become an integrated North American energy market under the trade agreement.

[1] Government of Canada, *Energy Efficiency Regulations, 2016: Regulatory Impact Analysis Statement*.

[2] Government of Canada, Discussion Paper Released on Review of Environmental and Regulatory *Processes*.

[3] Gilmour *et al*, *Canadian Government's Proposal to Reform Canada's Environmental Assessment and Regulatory Regime*, Bennett Jones (July 4, 2017); Also see Olszynski *et al*, *Sustainability must be at the core of the government's approach to assessing and approving economic projects in Canada*, Policy Options (September 5, 2017).

[4] Natural Resources Canada, *Forward, Together - Enabling Canada's Clean, Safe and Secure Energy Future*, Report of the Expert Panel on the Modernization of the National Energy Board, May 2017, and Volume II, Annexes.

[5] Ibid at 1.

[6] Nigel Bankes, *The NEB Modernization Report*, University of Calgary Faculty of Law - ABlawg (June 14, 2017).

[7] CBC, *Scrap NEB and replace it with 2 separate agencies, expert panel recommends* (May 15, 2017).

[8] Nigel Banks, *The Report of the Expert Panel on the Modernization of the National Energy Board and the Response of the Government of Canada*, Energy Regulation Quarterly (September 2017).

[9] Ministry of Energy, *2017 Long-Term Energy Plan* (October 26, 2017).

[10] Wong *et al*, *The electrification of the economy: Ontario's 2017 Long-Term Energy Plan*, Osler (November 15, 2017; Also see Ontario Chamber of Commerce, *Rapid Policy Update: Long-Term Energy Plan* (October 26, 2017).

[11] Ibid.

[12] Ibid.

[13] *Ibid.*

[14] Renewable Industries Canada, Statement regarding the Québec Government's 2017-2020 Action Plan under the 2030 Energy *Policy* (June 26, 2017), online:

[15] Karine Seguin, Government of Québec: New Action Plan for Electrification in Transport*, PIT Group, online:*

[16] Statement regarding the Québec Government's 2017-2020 Action Plan under the 2030 Energy Policy, supra note 15.

[17] Seguin, supra note 16.

[18] Mathieu LeBlanc and Martin Thiboutot, Québec Releases Energy Policy's 2017-2020 Action Plan*, Canadian Energy Perspectives (July 7,* 2017) online:

[19] Astrid Kalkbrenner, *Climate Change Legal Roadmap: Carbon Pricing Recommendations for Alberta, written whiten crew's Environmental law Centre (August 23, 2016), online:*

[20] Government of Alberta, *Carbon Levy and Rebates*, online:

[21] Alberta Energy Regulator, *New Edition of Directive 067: Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals* (December 06, 2017), online:

[22] Ibid.

[23] Geoffrey Morgan, *Alberta to crack down on oil executives that dumped orphan wells on taxpayers, Financial Post Press Release* (December 6, 2017), online:

[24] Alberta Energy Regulator, Bulletin 2017-13: Changes to Process for Transfer Application Decisions (July 24, 2017), online:

[25] Ibid.

[26] Ibid.

[27] Government of Alberta, *Electricity Capacity Market*, online:

[28] Alberta Electric System Operator (AESO) (website), Capacity market transition, online:

[29] Kimberly Howard and Gordon Nettleton, Alberta's Evolving Electricity Market - An Update on Recent Changes and Developments*, 5:2* Energy Regulation Quarterly (June 2017), online:

[30] Yukon News, *Trump's Energy Policies May Threaten Canadian Business, (December 30, 2016),online:*

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