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Recent Legislative and Regulatory Developments of Interest to Energy Lawyers

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Recent Legislative and Regulatory Developments of Interest to Energy Lawyers

Updates to oil and gas regulation + developments down the pipeline

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Presenters and the materials in this presentation do not speak on behalf of AUC Commission members. Commission members' views are expressed on the public record through AUC decisions.

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Standard of Review

- Statutory appeals: the appellate standard of review applies.
- Judicial review: presumption of reasonableness unless the **rule of law** requires a correctness standard
- Reasonableness review applies contextual factors previously seen in the “pragmatic and functional” analysis in *Pushpanathan* or the contextual analysis in *Dunsmuir*, including expertise of the tribunal.

- Potential for re-litigation of questions of law:
 - *ATCO Electric Ltd v Alberta (Utilities Commission)*, 2022 ABCA 73.

- Should correctness apply to all questions of law?
 - *TransAlta Corporation v Alberta (Utilities Commission)*, 2022 ABCA 37 at paras 25-26.

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- *O.K. Industries Ltd. v. District of Highlands*, 2022 BCCA 12
 - New exception: answer to whether bylaw applied required consistency, and a final and determinate answer and had significant legal implications to the institutions of provincial and municipal governments that purport to regulate mining resources in Canada.
 - Exception may not have been required because no decision of administrative body and within inherent jurisdiction of the court (Paul Daly).

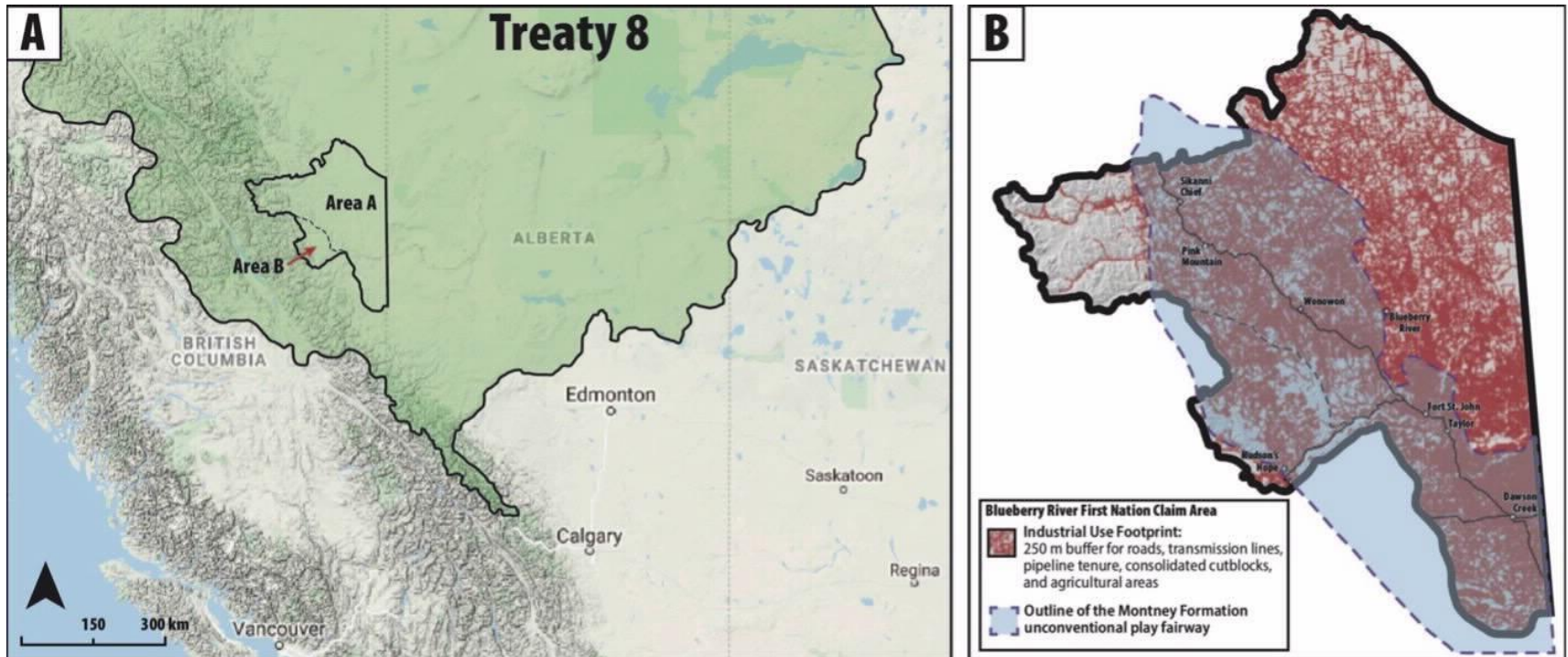
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Aboriginal Law Developments in Canada

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- United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)
 - *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44
 - See also *Interpretation Act*, RSBC 1996, c 238, s 8.1
 - UNDRIP legislation has “no immediate impact on existing law and is simply “a forward-looking” statement of intent that contemplates an “action plan” yet to be prepared and implemented by either level of government.” (*Thomas and Saik’uz First Nation v Rio Tinto Alcan Inc*, 2022 BCSC 15 at para 210)
 - *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14

Cumulative Impacts

Yahey v British Columbia



Significant industrial development of Treaty 8 lands meaningfully diminished Blueberry River First Nations (“Blueberry River”) rights to hunt, fish and trap.

Cumulative Impacts

Yahey v British Columbia

- The BCSC declared:
 - The province breached its Treaty 8 obligations, including the honour of the Crown and its fiduciary duties, by permitting the cumulative impacts of industrial development on Blueberry River's Treaty rights.
 - The province has infringed Blueberry River's Treaty 8 rights by taking up lands to such an extent that there are not sufficient and appropriate lands for Blueberry River members to meaningfully exercise their Treaty rights.
 - The province is **prohibited from continuing to authorize activities** that breach Treaty 8 or that unjustifiably infringe on Blueberry River's Treaty rights.
 - The province and Blueberry River are required to **consult and negotiate enforceable mechanisms** to assess and manage the cumulative impacts of industrial developments on Blueberry River's Treaty rights and ensure that those rights are respected.
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- October 7, 2021 – initial agreement between British Columbia and Blueberry River
 - \$35 million to fund land restoration activities
 - \$30 million to support Blueberry River in protecting their Indigenous way of life
 - 195 projects permitted prior to the decision will proceed
 - 20 authorizations halted subject to further negotiation and agreement from Blueberry River
- *Anderson v Alberta* – scheduled for 2024
- Carry The Kettle First Nation (Treaty 4) commenced action against Government of Saskatchewan

AltaLink Management Ltd v Alberta (Utilities Commission) (ABCA)

- New T-line crossing Piikani Indian Reserve No 147 and the Blood Indian Reserve No 148 – shortest and lowest cost, no significant environmental impacts, and affected the least number of landowners
- AUC approved transfer of ownership to KainaiLink and PiikaniLink limited partnerships, but did not allow recovery of external auditor and hearing costs and refused to consider cost-savings of route selection in applying the “no-harm” test
- ABCA reversed, finding the AUC erred in only considering forward-looking benefits

Southwind v Canada

- The SCC found that the trial judge erred by focusing on what Canada likely would have done instead of what it should have done as a fiduciary
- The SCC held that Canada ought to have attempted to negotiate a surrender, as its fiduciary obligations required it to preserve LSFN’s quasi-proprietary interest, advance its best interests, and ensure the highest compensation possible



Updates to Oil and Gas Regulation





Updates to Oil & Gas Regulation

Québec

- Québec passed Bill 21, which is aimed at ending exploration for and production of oil and gas

Newfoundland and Labrador

- The Minister of Industry, Energy and Technology announced on December 30, 2021, that it was extending the eligibility of the Offshore Exploration Initiative to include wells spudded up to December 31, 2023
- The federal government approved Equinor Canada Limited's Bay du Nord project



Developments down the pipeline





Developments down the pipeline

Two significant decisions from the Canadian Energy Regulator

- Canadian Energy Regulator Reasons for Decision – Enbridge Pipelines Inc. (November 2021)
- Reasons for Decision – NOVA Gas Transmission Ltd., Application for Firm Transportation – Linked North Montney Service (March 2022)



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Power

Modernizing Electricity in Alberta

- On November 17, 2021, the Government of Alberta introduced Bill 86
 - Allows parties to build generation to serve their own needs and export the surplus to the grid
 - Clarifies issues related to the use of energy storage, including setting out the circumstances under which distribution and transmission utilities can, and cannot, own energy storage
- Under Bill 86, transmission facility owners could own energy storage included in a needs identification document, but not sell the electric energy from storage into the power pool
 - Distribution facility owners require approval from the AUC to operate energy storage facilities
- Bill 22 adopts many of the same changes, and allows existing self-supply to get ISD

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Mining

Alberta's Coal Policy Redux

- **1976:** adoption of the *Coal Development Policy for Alberta* (the “**Coal Policy**”)
- **2020:** rescission of the Coal Policy and introduction of new leasing rules
- **2021:** reinstatement of the Coal Policy and establishment of the Coal Policy Committee
- **2022:** release of two reports by the Coal Policy Committee
 - Key recommendation was to replace the Coal Policy by a modernized approach to coal exploration and development through regional and subregional plans under the *Alberta Land Stewardship Act*

Alberta's Production of Strategic and Critical Minerals

- The Government of Alberta recently developed a strategy to “re-energize Alberta’s minerals sector” and encourage development of critical and strategic minerals such as lithium, uranium, vanadium and rare earth elements
 - Goal is to become a “preferred producer and supplier of minerals and mineral products and actively [contribute] to the global energy transformation”

New Federal Policy

- On June 11, 2021 the Government of Canada issued a policy statement on thermal coal mining:
 - “...the Government of Canada considers that any new thermal coal mining projects or expansions of existing thermal coal mines in Canada, are likely to cause unacceptable environmental effects. This position will inform federal decision making on thermal coal mining projects”
- Policy statement strongly suggests that new thermal coal mine projects that are subject to federal assessment are unlikely to be approved
 - The new federal policy applies only to thermal coal used to generate electricity

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Greenhouse Gas Emission Reduction

Greenhouse Gas Emission Reduction Carbon Capture, Utilization, and Storage (CCUS)

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Federal

- CCUS Tax Credit in April 2022 Budget.
- Captured CO₂ for “eligible use”: dedicated geological storage or storage in concrete, but not enhanced recovery schemes.
- 60% for investment in equipment to capture CO₂ in direct air capture projects; 50% for investment in equipment to capture CO₂ for other CCUS projects; 37.5% for investment in equipment for transportation, storage, and use (50% of each after 2040).

Alberta

- Carbon storage hubs.
- Six proposals selected in Heartland region.
- RFPs in all other regions of Alberta were accepted between April 25 and May 2, 2022

Saskatchewan

- November 2021: CO₂ pipelines (CCUS or enhanced oil recovery) are now part of the provincial Oil Infrastructure Investment Program which provides royalty production credits.

Ontario

- The Government of Ontario issued a Discussion Paper titled *Geological Carbon Storage in Ontario*, which discusses narrowing the prohibition on injection of CO₂ underground.

Greenhouse Gas Emission Reduction Carbon Pricing System

Federal

- Part 2, *Greenhouse Gas Pollution Pricing Act*: output-based pricing system (“**OBPS**”) for industrial facilities which requires “covered facilities” to compensate for greenhouse gas emissions that exceed an annual facility emissions limit
- Applicable to provinces and territories unless the federal government determines their system meets its stringency requirements.
- Up until this year it applied in the Yukon, Nunavut, Saskatchewan (certain sectors), Ontario and PEI.

Saskatchewan

- January 2022: industrial facilities in five additional sectors now subject Saskatchewan's OBPS that was established in January 2019 (*The Management and Reduction of Greenhouse Gases (Standards and Compliance) Regulation*).
- Plans for remaining sectors (electricity generation and natural gas transmission) to join.

Ontario

- September 2021: Ontario’s emissions performance standards program (“**EPS**”) met the federal stringency requirements.
 - Effective January 1, 2022, with regulatory amendments made to the *Emission Performance Standards Regulation* to ensure a smooth transition from the Federal OBPS.
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Greenhouse Gas Emission Reduction

Electric Vehicles (EVs)

Federal

- Extended the incentive (up to \$5,000) for light-duty zero-emission EVs (“ZEVs”) until March 2025.
- Broadened the program to support more vehicle models
- Expanded availability of zero-emission electric vehicles and charging stations
- Promised to launch incentive program from medium- and heavy- duty ZEVs

British Columbia

- Rates for public utilities to provide EV direct current fast charging:
 - November 24, 2021: British Columbia Utilities Commission (“**BCUC**”) approved FortisBC Inc’s rates on a permanent basis
 - January 26, 2022: BCUC rejected BC Hydro and Power Authority’s proposed permanent EV charging rates because they did not reflect cost of service.
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Conclusions

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- Increasing importance and urgency of steps to address climate change
 - Continuing evolution of law related to engagement, consultation, and assessment of potential impacts to First Nations
 - Foreseeable future for oil and gas as key form of energy production
 - Notable areas to watch:
 - Development of a domestic critical mineral industry
 - Other breaches of Aboriginal and Treaty rights based on cumulative impacts
 - Alberta's legislation to modernize its electricity system
 - Alberta Court of Appeal's opinion regarding the *IAA*
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Thank you



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